

86-640 ①

Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GENEVA HARRIS, as Personal
Representative of the Estate
of Doretha a/k/a Dorothea Rolle,
Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

City of Miami v. Harris, 490 So.2d 69
(3d DCA 1985)

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of Doretha a/k/a Dorothea Rolle,
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THE CITY OF MIAMI,

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QUESTIONS PRESENTED

I. DOES SECTION 1983 MUNICIPAL LIABILITY ATTACH WHEN A DULY PROMULGATED, WRITTEN MUNICIPAL POLICY IS "INADEQUATE", CHARACTERIZED AS ONE "OF RECKLESS DISREGARD FOR HUMAN LIFE", AND "BECAUSE OF THIS POLICY" AN "INNOCENT PERSON WAS PLACED IN OBVIOUS JEOPARDY "AND KILLED, OR IS IT ALSO NECESSARY TO PROVE THAT . . . "IN ESTABLISHING THIS POLICY THE CITY POLICYMAKERS ACTED MORE THAN NEGLIGENTLY"?

IA. DOES DANIELS V. WILLIAMS, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) REQUIRE THAT THE STATE OF MIND OF THE POLICY MAKERS BE PROVEN AT THE TIME THEY ENACTED THE WRITTEN POLICY IN ORDER FOR MUNICIPAL LIABILITY TO ATTACH FOR ACTIONS TAKEN PURSUANT TO AND IN ACCORDANCE WITH ("MANDATED BY") THE POLICY?



II. DOES SECTION 1983 MUNICIPAL POLICY LIABILITY ATTACH WHEN A DULY PROMULGATED, WRITTEN POLICY OF POLICE PROCEDURE WITH "EXPRESS RULES AND REGULATIONS" IS "INADEQUATE", CHARACTERIZED "AS ONE OF RECKLESS DISREGARD FOR HUMAN LIFE", AND "BECAUSE OF THIS POLICY" AN "INNOCENT PERSON WAS PLACED IN OBVIOUS JEOPARDY AND KILLED" OR, IS IT ALSO NECESSARY TO SHOW THAT THERE WAS "A DELIBERATE CHOICE TO FOLLOW A COURSE OF ACTION" "MADE FROM VARIOUS ALTERNATIVES BY THE OFFICIAL OR OFFICIALS RESPONSIBLE FOR ESTABLISHING FINAL POLICY WITH RESPECT TO THE SUBJECT MATTER IN QUESTION"?

IIA. IS THAT WHICH FOLLOWS THE "ALSO" A REDUNDANCY IN QUESTION II ABOVE??

IIB. DOES PEMBAUR V. CINCINNATI, U.S. 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) IMPOSE A STATE OF MIND REQUIREMENT TO BE APPLIED IN A CONTEXT OF WRITTEN AND FORMALIZED MUNICIPAL POLICY CONTAINING EXPRESS RULES AND REGULATIONS SUCH THAT IT IS NECESSARY TO KNOW WHAT THE POLICY MAKERS CHOSE FROM AND CONSIDERED IN ORDER TO BE ABLE TO STATE THAT THE FINAL POLICY "WAS A DELIBERATE CHOICE . . . MADE FROM AMONG VARIOUS ALTERNATIVES"?

III. IN THE CONTEXT OF MUNICIPAL LIABILITY FOR DEATH OF AN INNOCENT BYSTANDER FROM POLICE ACTION MANDATED AS A RESULT OF A DULY FORMALIZED, WRITTEN POLICE POLICY, WHICH IS A "POLICY OF RECKLESS DISREGARD FOR HUMAN LIFE", IS IT NECESSARY FOR MUNICIPAL LIABILITY TO ATTACH TO PROVE BOTH THAT:



A. THE POLICY MAKERS ACTED MORE THAN
NEGLIGENTLY, AND

B. THE POLICY MAKERS DELIBERATELY
CHOSE THE POLICY FROM VARIOUS OTHER
ALTERNATIVES.

IV. WHEN A MUNICIPAL POLICY MANDATES
THE USE OF IMPERMISSIBLE EXCESSIVE (DEADLY)
FORCE IN EFFECTUATING THE ARREST OF A
FLEEING UNARMED FELON, SUCH THAT DANGER TO
INNOCENT THIRD PARTIES IS RECKLESSLY
DISREGARDED AND SUCH POLICY CAUSES DEATH TO
AN INNOCENT PARTY, IS MORE NECESSARY FOR
MUNICIPAL LIABILITY TO ATTACH?



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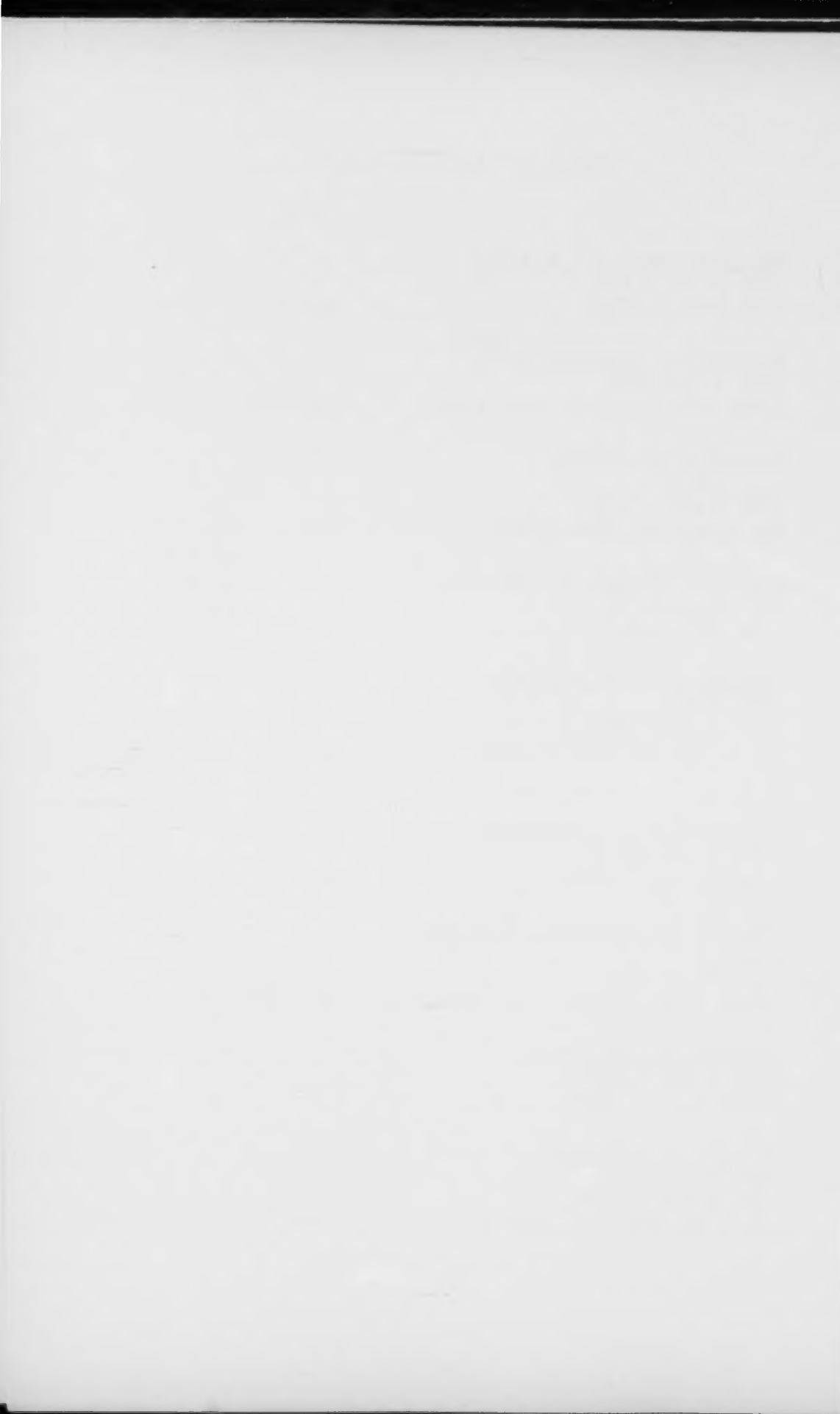
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THIRD DISTRICT

OPINIONS OF THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

The Court below issued three opinions
in this matter. The first of these
opinions upheld a jury verdict in favor of
Petitioner on her claim based upon 42



U.S.C. Section 1983. The opinion On Rehearing reversed the Court's prior decision on Petitioner's Section 1983 claim, and remanded the cause for a new trial on that count. In the final opinion, On Second Motion for Rehearing, the Court espoused a new reason for adhering to its prior opinion On Rehearing.

All of these opinions may be found at City of Miami v. Harris, 490 So.2d 69 (Fla. 3d DCA 1985). Petitioner has also reproduced the original opinions of the Third District Court of Appeal in the Appendix (A. 1-37).

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review of the opinion on Second Rehearing of the Third District Court of Appeal of Florida which was entered on June 3, 1986. In conjunction therewith review is sought of the Court's original opinion dated December 17, 1985, and its Opinion On Rehearing dated April 1, 1986. Timely motions to each were filed.

The final opinion denying Petitioner's Motion for Rehearing and/or Clarification and/or Certification to the Florida Supreme Court was entered on July 14, 1986. (A. 1-2).

Because of the limited nature of the jurisdiction of the Florida Supreme Court, the Third District Court of Appeal is the highest court of Florida in which a decision could be had in this matter. The only means available to Petitioner for invoking the jurisdiction of the Florida Supreme Court in this case was to show that the decision of the Third District Court of Appeal was expressly and directly in conflict with the decision of another District Court of Appeal, or of the Supreme Court on the same question of law. Fla. Const. Art. V Section 3 (b)(3); Fla. Stat. Ann. Vol. 26, Const. Art. V. Section 3(b)(3), (Supp. 1986); See also, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).



Counsel for Petitioner has diligently and completely researched the law of the State of Florida in an attempt to reveal a case in another District Court of Appeal which is in conflict with any of the opinions of the Third District Court of Appeal. It was counsel for Petitioner's hope that he would uncover a conflict which could form the basis for invoking the jurisdiction of the Florida Supreme Court. Such, however, was not the case. Counsel for Petitioner could find no cases whatsoever which apply the standards set forth in Pembaur v. Cincinnati, ____ U.S. ____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) and Daniels v. Williams, 474 U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) either in a similar manner, or in a way in conflict with the opinion of the Third District Court of Appeal.

Petitioner, in an equally fruitless attempt to establish jurisdiction in the Florida Supreme Court, also requested that

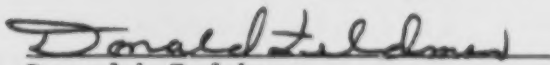


the Third District Court of Appeal certify this matter to the Florida Supreme Court as a matter of exceptional importance.

(A. 149-172) This request was summarily rejected by said Court. (A. 1-2)

Counsel for Petitioner reasonably and diligently sought to establish legitimate jurisdiction in the Florida Supreme Court, a court of limited jurisdiction. As an officer of that Court, it was and is the undersigned's studied belief that such could not be accomplished.

The undersigned as a member in good standing of the Florida Bar hereby certifies the above to be true and correct.


Donald Feldman

In light of the above, Petitioner now seeks to invoke the discretionary jurisdiction of this Honorable Court



pursuant to the provisions of 28 U.S.C.
Section 1257(3).

STATUTE INVOLVED
42 U.S.C. Section 1983

Section 1983 Civil action for
deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. INTRODUCTION

ORIGINAL ARTICLES

THE EFFECT OF VITAMIN C ON THE
HEALTH OF MAN

BY DR. J. V. CAMPBELL, JR.,
CHICAGO, ILL.

RECEIVED FOR PUBLICATION
OCTOBER 15, 1931

REPRINTED FROM THE JOURNAL OF THE
AMERICAN MEDICAL ASSOCIATION

Copyright, 1932, by the American Medical Association
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535 North Dearborn Street, Chicago, Ill.

Subscription price, \$5.00 per annum in advance
Single copies, 15 cents

Entered as second-class matter, May 2, 1912
Postpaid

Acceptance for mailing at special rate of postage provided for
in Act of October 3, 1917, authorized on July 16, 1931

Postmaster: This journal is published weekly except on
Sundays and legal holidays

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Because the initial decision of the Honorable District Court of Appeal of Florida, Third District ("Florida Court") (December 17, 1985) well states the facts of this case, and as the subsequent two decisions of that Court on rehearing directly change the result herein solely on the basis of the Court's preceived change in the law by this Honorable Court (Daniels and Pembaur), liberal quotation to that decision will be employed herein.

It is, we respectfully submit, unwise to argue with or quibble with the factual and procedural statements of the Florida Court as:

1. Whether right or wrong, they form the basis for clearly articulated principles of law, and their perceived change by this Honorable Court. Thus, the legal parameters for Section 1983 liability for municipal policy are formatted for expeditious treatment by this Honorable Court.



2. The sole basis of reversal by the Florida Court of the judgment entered on a jury verdict for Plaintiff HARRIS in the trial court, is one of law. Factual and evidentiary issues were resolved by the Florida Court in HARRIS' favor; and

3. If this Honorable Court deems it necessary to examine in depth some aspect of the factual or evidentiary basis of this action, it can, of course, do so at any time. But for us to do so in framing a prima facie reason for this Court to accept certiorari, we deem it unwise.

Thus, save in only two instances we will not implement the actual decision of the Florida Court by a citation to the record below. Thus, two instances of citations will be utilized to satisfy any thought that the underlying havoc wreaked by the policy in question is not substantial enough to merit constitutional status and also to give some human coloring to the otherwise sterile words of



the opinion. These two instances will be set off between (* . . .*) asterisks to denote them.

The separately bound Appendix hereto contains various pleadings in the Florida Court. They can be utilized, if necessary, to document record pages and substantiate that all of that argued herein was properly before the Florida Court.

B. FACTS

GENEVA HARRIS brought a wrongful death action in the Circuit Court for Dade County ("trial court") on behalf of herself, the Estate of her daughter, Doretha Rolle, and her three minor grandchildren who were the children of Doretha.

(*Doretha Rolle lived in the Ghetto with her three children. She was 32 years of age and worked as a cook at the Dorsey Skills Center in order to support her three children. Glendora was 17, Aaron 12 and Derrick 13 years of age at the time of her accident (T 523 and T 524). Mrs. Geneva

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900

CHICAGO
PUBLISHED BY THE
UNIVERSITY OF CHICAGO PRESS
1901

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1901

Harris, 50 years old, Doretha's mother, was dependent in part upon her for support because of an inability to engage in full time employment due to physical infirmities.*) The action was brought against THE CITY OF MIAMI for negligence under Florida state law and for violation of 42 U.S.C.A. Section 1983. The Section 1983 count was predicated upon an express policy of THE CITY OF MIAMI regarding police chases.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

Geneva Harris, Mrs. Rolle's mother and personal representative, brought an action against the City on behalf of the estate and Mrs. Rolle's three minor children, alleging that the City's police officers were negligent and, in a separate count brought under the authority of Title 42 United States Code, Section 1983, that the City's unreasonable policy in regard to pursuit of law violators deprived Mrs. Rolle of her constitutionally guaranteed rights. (Footnotes omitted)
(A. 19-20)

The facts of the chase and its consequences are fairly straight forward.

(*Doretha Rolle was seated on a bus bench in Liberty City on Northwest 17th Avenue and Northwest 58th Street. It was Sunday evening, April 27, 1980. Approximately twenty to twenty-five minutes before, one Tyrone Grant Rolle, of no relation to Doretha, had just committed a burglary of some shirts and cigarettes at a J. C. Penny Store at Northeast 79th Street and Biscayne Boulevard (T 149).

A high speed police chase involving every police vehicle in the Northern sector of the City ensued with gun shots being fired at the pursuee (T 224).

The undisputed facts of the chase are that it was high speed (up to 70 m.p.h.) (T 155). The felon's vehicle did not have its lights on (T 150), went through red lights and stop signs, and just missed hitting vehicles (T 155). An attempt was made to block the road with a police

vehicle, which only caused accelerated speed and driving on the sidewalk (T 664-666).

The vehicle ran through the front yard of a house, and ran into a police vehicle or it was thought that he was going to ram somebody (T 173). There was no supervision of the chase, and supervision would have helped (T 177, 199, 200, and 219). Coordination was virtually nonexistent (T 174), even though every unit of the Northern half of the City of Miami Police Department was involved in the chase (T 554).

The police cars were playing "DODGEM". (T 639-641).

Officer Crowley testified that the area toward the end of the chase was congested with police and other vehicles (T 168).

Colonel Witt testified that the area was congested with people. (T 739).

Finally, the police rammed the robber's vehicle, locked fenders, and forced him off

1840-1841. The first year of the
year was a very dry one.

The second year was a very wet one.

The third year was a very dry one.

The fourth year was a very wet one.

The fifth year was a very dry one.

The sixth year was a very wet one.

The seventh year was a very dry one.

The eighth year was a very wet one.

The ninth year was a very dry one.

The tenth year was a very wet one.

The eleventh year was a very dry one.

The twelfth year was a very wet one.

The thirteenth year was a very dry one.

The fourteenth year was a very wet one.

the road into and over Doretha Rolle. She was dragged underneath the offender's vehicle for approximately a block and during such time, she suffered severe, painful, and eventually death producing burns.

Before she died, however, Doretha Rolle was hospitalized at the University of Miami Burn Center, Jackson Memorial Hospital, and she lingered through nineteen horrendous days before she expired (T 469). During that course of time, she had to undergo a partial mastectomy and a complete mastectomy. "Her breasts were burned so badly that we actually had to remove them." (T 473). It is unnecessary to describe in detail what this hospitalization was like and what the family saw and what their reaction to it was. It was anything but a de minimis situation.*)

ORIGINAL OPINION OF FLORIDA COURT

(December 17, 1985)

* * *

When police officers of the City of Miami, in high-speed pursuit of a vehicle being driven by a suspected burglar down a congested street, rammed the fleeing suspect's car, locked fenders with it, and forced it off the road into a bus bench on which Mrs. Doretha Rolle was sitting, Mrs. Rolle was killed.

(Emphasis supplied)

(A. 19)

* * *

. . . The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

(Emphasis supplied)

(A. 24)

The state law count for respondeat superior liability of the CITY for the negligent actions of its police officers was tried with the Section 1983 count for direct liability of the CITY for its inadequate policy. The jury found for the Plaintiffs on both counts and assessed total damages in the sum of \$595,000. Attorneys' fees under 42 U.S.C. Section

1988 in the sum of \$100,000. were thereafter awarded by the Court.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

A jury returned a verdict for the plaintiffs, finding that the negligence of its officers (for which the City was responsible through the doctrine of respondeat superior) and the City's "inadequate policy in regard to police chases" both were the legal causes of Mrs. Rolle's death. The jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and did not allocate the damages to one or the other of the causes of action. The trial court entered judgment on the verdict and, after separate hearing, awarded the plaintiffs' attorneys \$100,000 in fees under the authority of Title 42 United States Code, Section 1988, which, inter alia, authorizes the award of attorneys' fees to parties prevailing under Section 1983.
(Footnotes omitted)
(A. 20)

Because Florida law restricts the amount of the damages recoverable against a municipality and attorney's fees are not awardable thereunder, the Section 1983 count became of paramount importance.



ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

3/ This court must reach the question of the City's liability under Section 1983 regardless of the resolution of the common law negligence count because (a) attorneys' fees may be awarded under the Section 1983 count but not under the common law negligence count, and (b) the City implicitly concedes that the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute, see Section 768.28(5), Fla.Stat. (1983), [?] clearly applicable to the common law negligence count, do not serve to reduce any recovery under the Section 1983 count.
(Question mark supplied as accident and death took place in 1980) (A. 35)

C. CHARACTERIZATION OF THE POLICY

1. The Florida Court clearly recognized that this was a case which was governed by an existent City policy, and that proof of a policy by custom, practice or by single act was not necessary.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *



5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, _____ U.S. _____, 105 S.Ct. 2427, 85 L.Ed.2d 791. (Emphasis supplied)
(A. 35-36)

This expressly formulated policy of the CITY OF MIAMI:

(a) Mandated that the police officers pursue fleeing suspects until apprehension.

ORIGINAL DECISION OF FLORIDA COURT
(December 17, 1985)

* * *

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the



public or the officer.
(Emphasis supplied) (Footnotes
omitted) (A. 23)

(b) Mandated the use of deadly force
which threatened the lives of innocent
persons such as herein.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

Similarly, the City of Miami in
the present case had a policy of
pursuing fleeing suspects that
failed to take into account the
danger to innocent third parties.
Moreover, the City's policy pro-
vided that an officer who failed
to continue pursuit until appre-
hension would be disciplined.
The police officers thus knew
when they acted that their use of
deadly force in the form of a
speeding vehicle which threatened
the rights and safety of innocent
persons would meet with the
approval of, and indeed was re-
quired by, the City policymakers.
(Emphasis supplied)
(A. 25-26)

(c) Was characterized as one of
reckless disregard for human life.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985).
(Emphasis supplied)
(A. 24)

(d) Caused the death of Plaintiff's decedent, DORETHA ROLLE.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

. . . The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle-- was actually killed.
(Emphasis supplied)
(A. 24)

D. THE ORIGINAL OPINION: RATIO DECIDENDI

The original opinion of the Florida Court applied the principles of liability for municipalities in a rather straight forward manner. The traditional Monell approach (Monell v. Department of Social



Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) was utilized -- policy being the moving force of the deprivation.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom was "the moving force of the constitutional violation." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978).
(Footnotes omitted)
(A. 22)

After analysis of the CITY OF MIAMI policy, as hereinbefore set forth, as one of reckless disregard for innocent lives and which caused the death herein, the judgment of the trial court was affirmed in all respects material to this petition.

E. THE FIRST REHEARING: 180 DEGREE TURN
(Daniels v. Williams, 474 U.S. _____.
106 S.Ct. 662 88 L.Ed.2d 662 (1986)

THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

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While the case was pending in the Florida Court on the CITY OF MIAMI'S rehearing motions directed to the original opinion of December 17, 1985, This Honorable Court decided Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Without giving your Petitioner, HARRIS, an opportunity to address Daniels, the Florida Court granted rehearing, receded from its original opinion, and remanded the case for a new trial on what it perceived to be the new standards required by Daniels. The pertinent parts of the Florida Court's Opinion On Rehearing are as follows:

FLORIDA COURT'S FIRST REHEARING OPINION
(April 1, 1986)

* * *

In the month following the release of our opinion in this case, and while the appellant's timely-filed motion for rehearing pending, the United States Supreme Court, overruling its prior contrary holding, - decided that mere negligence by a state



official can no longer be said to "deprive" an individual of life, liberty or property under the Fourteenth Amendment and thus support a claim for relief under Title 42, United States Code, Section 1983. See Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). (Footnotes omitted)
(A. 9)

* * *

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a "reckless disregard" of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

As we noted in our initial opinion, the jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and



did not allocate the damages to either the common-law negligence or the Section 1983 count of the complaint. So long as the Section 1983 action was affirmable (and until Daniels it was), . . . (Emphasis supplied)
(A. 10-11)

A Motion to Vacate Order on Rehearing, etc., was filed because it was believed that the Court's opinion was not only wrongly decided, but it was formulated without Appellee/HARRIS having had any chance for an input on the effect of Daniels on her case. (A. 42-68) This Motion was denied. (A. 6-7).

F. THE HARRIS REHEARING MOTION

A timely Motion for Rehearing was filed by HARRIS which attempted to demonstrate that:

1. The Opinion on Rehearing was ambiguous, but that, in any event, it appeared to create a state of mind requirement for municipal policymakers.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

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One of the very real problems generated by this Honorable Court's Opinion on Rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policy-makers is the test to be applied or is it holding that the standard is the import of the policy itself?

We respectfully submit that this problem is not addressed by this Honorable Court and the language of the Opinion itself engenders confusion.

(A. 111-112))

2. The Opinion On Rehearing, by including a state of mind requirement, violated the teachings of Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) as it related to municipal liability for policy.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/random, individual actions, is whether or not an authorized policy, when executed, results in loss of constitutional rights. See, e.g. Pembaur, supra; Monell, supra. It is this hallmark dis-

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inction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit, even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith. (A. 114-115)

* * *

The difference between suits against individuals in their personal capacity and suits against those individuals in their official capacity (governmental policy suits) is strikingly reaffirmed in Brandon v. Holt, _____ U.S. _____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); and Kentucky v. Graham, 473 U.S. _____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). (Emphasis in original) (A. 117)

3. The Daniels case applied to random, unauthorized acts and did not apply to measure liability pursuant to officially formulated municipal policy.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *



Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). The Monell principle, aptly relied upon by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.
(Emphasis in original)
(A. 98-99)

4. Pembaur v. City of Cincinnati, ____ U.S. ____, 106 S.Ct. 1292, 89 L.Ed.2d 452, (1986) [54 L.W. 4290 (March 25, 1986)], which was decided at about the time the Florida Court was writing its Rehearing opinion, was totally inconsistent with the Florida Court's treatment of Daniels. As the municipal policymaker in Pembaur was acting in good faith and without



negligence, there would be no county liability under the state of mind test attributed to Daniels, in policy cases, by the Florida Court. Yet, of course, it was pointed out that liability was found by this Honorable Court.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

D. Pembaur v. City of Cincinnati,
— U.S. —, 54 L.W. 4290
(March 25, 1986)

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing,



this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policymakers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court would have been obliged to dismiss plaintiff's action because it is clear that the policy-maker, by making policy in accordance with the law of forcible entry as it then existed, did not act negligently, recklessly or willfully. (Rightously [sic] if anything!)

It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policy-maker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability for random, unauthorized acts.

(Emphasis in original and supplied)

(A. 117-119)

G. THE SECOND REHEARING: (WITHOUT "DEBATING" DANIELS - BUT BASED ON "STILL MORE RECENTLY DECIDED" PEMBAUR)

The Florida Court concisely stated your Petitioner/HARRIS' argument regarding the misapplication of Daniels but chose not to "debate" it.

THE FLORIDA COURT'S SECOND REHEARING OPINION

(June 3, 1986)

This second opinion on rehearing is in response to the motion of the plaintiffs-appellees. They complain that in the first rehearing (sought by the defendant-city) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, . . .
(Emphasis supplied)
(A. 4)

The Florida Court then immediately turned to Pembaur to justify its "On Rehearing" remand for a new trial.

THE FLORIDA COURT'S SECOND
REHEARING OPINION
(June 3,, 1986)

* * *

. . .[W]e note that in the still more recently decided case of Pembaur v. Cincinnati, _____ U.S. _____, _____, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under Section 1983 attaches where--and only where-- deliberate choice to



follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.
(Emphasis supplied)
(A. 4-5)

HARRIS, frankly, exasperated at being told that she could have prevailed before Pembaur, but not after, filed her authorized Motions for Rehearing to this opinion.

An attempt was made to show:

1. That Pembaur was not concerned with adding a state of mind requirement to cases where municipal policy was clearly evidenced by express rules and regulations;
2. That the phrase "a deliberate choice to follow a course of action made

from various alternatives" was used to determine if a policy was in fact made on one particular occasion for one particular purpose by one high ranking official; and

3. The state of mind inquiry would, in any event be pretermitted by Owen v. City of Independence, supra, Kentucky v. Graham, 473 U.S. _____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and Brandon v. Holt, _____, U.S. _____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985).

HARRIS' SECOND MOTION FOR REHEARING
(June 10, 1986)

* * *

It is virtually impossible to write that which follows because we truly and humbly submit that it should never need be written.

In this regard the Panel of this Honorable Court has previously held that the policy of The City of Miami in regard to police chase was established by express rules and regulations.

* * *

This was similarly the case in Monell. Is it to be imagined that Pembaur would now require Mrs. Monell, if decided today, to

show that "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"?

It is submitted that the existence of the written policies and procedures in Monell, which were designed to apply in all instances, would make such an inquiry meaningless.

* * *

We are now back into the prohibited state of mind inquiry pretermitted by Owen vs. City of Independence; Brandon vs. Holt; and Kentucky vs. Graham.

* * *

The Pembaur majority then extends Monell; expanding its contours for liability to singular decisions by single individuals (an expressed rule or regulation was absent).

* * *

We respectfully submit that to take Pembaur, which is probably the single most expansive decision on municipal liability since Monell and Owens, written by the Justice who is consistently the most vocal and consistent advocate of expanding the contours of municipal liability, and turn it into a small noose to choke off municipal culpability -- would suggest that which

follows.

V

Justice Must Have The Appearance
Of Justice (Not a "Debate").
(Emphasis in original)
(A. 157-163)

H. THE FINAL OPINION
(July 14, 1986)

By Order dated July 14, 1986, The Florida Court denied HARRIS' Second Rehearing Motion, and declined to certify the matter to the Supreme Court of Florida.
(A. 1-3)

REASONS FOR GRANTING CERTIORARI

It is respectfully prayed that this Honorable Court grant certiorari herein for the following reasons:

A. GENERALLY

I. The easiest stated reason for this Honorable Court granting certiorari is that the decision of the Florida Court wrongly construes an important Federal Statute, clearly and directly;

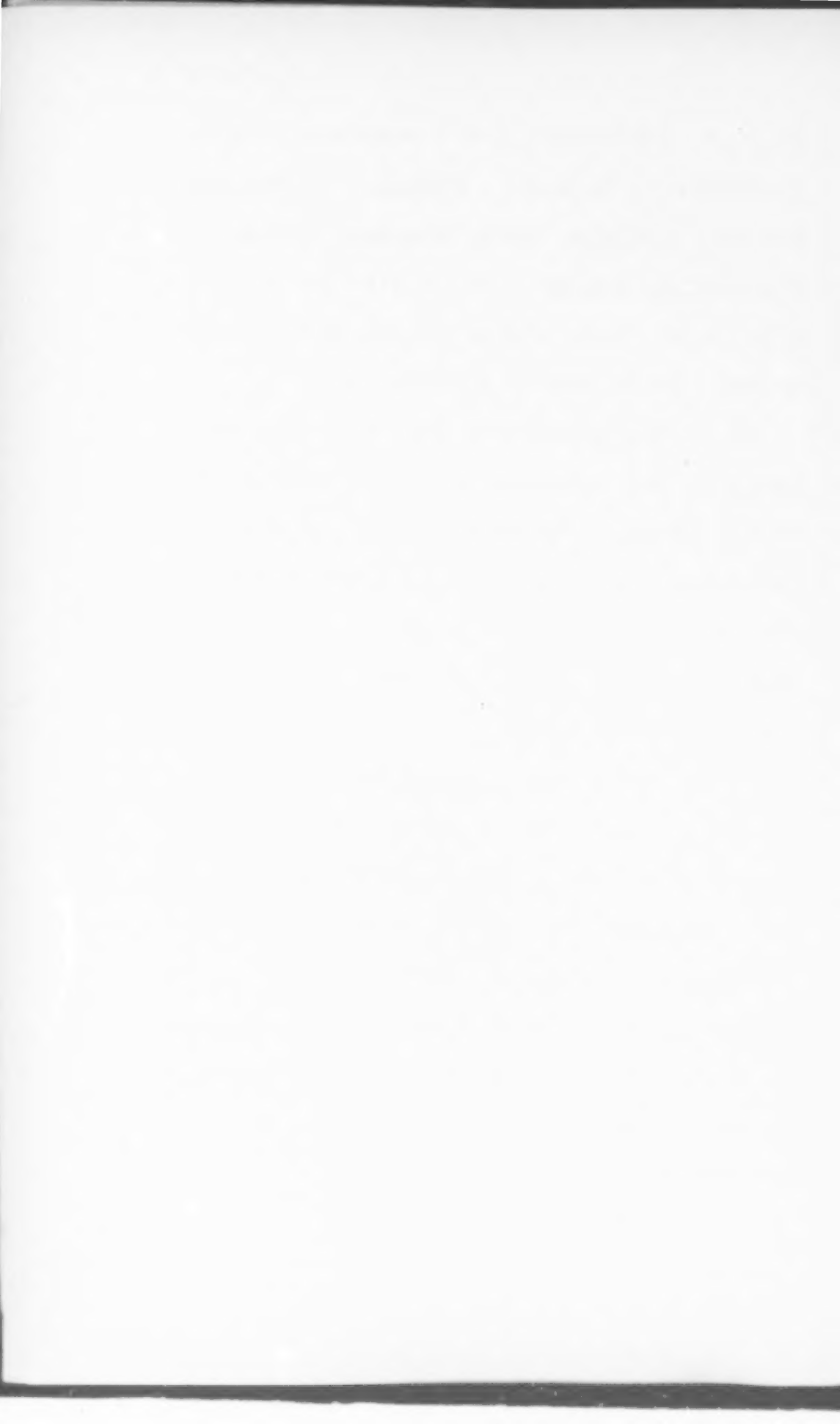
II. The decision of the Florida Court is in direct conflict with this Honorable



Court's decisions in numerous cases, including Monell, Hudson, Zimmerman, Parratt, Daniels, Owen, Brandon, Garner and Kentucky v. Graham. It is also in conflict with a multiple number of decisions by the United States Courts of Appeals;

III. The underlying factual patterns of Parratt and Daniels were the weakest for establishing Section 1983 liability. Certiorari was granted in those cases and the law was written in such a fashion as to emphasize the need of not trivializing Constitutional torts.

The case sub judice is anything but trivial, and can readily be used to demonstrate the inapplicability of Parratt and Daniels to such a clear instance of inadequate municipal policy. Here the policy of the CITY OF MIAMI was inadequate to protect the rights of innocent persons during regularly occurring police procedures; and



IV. If allowed to stand as written and given the added imprimatur of a cert. denied in its citation, (legally of no moment, but pragmatically of great) the opinion of The Florida Court will virtually eliminate any semblance of municipal liability where duly enacted express rules and regulations are the moving force of a deprivation of life, liberty, or property.

THE STATE OF MIND OF POLICYMAKERS HAS NOTHING TO DO WITH MUNICIPAL LIABILITY -- IT ONLY ALLAYS FEARS OF AN INCHMEAL DEMISE OF THE CIVIL RIGHTS ACT BY FINISHING IT AT ONCE.

Referring to the excerpts from the opinions on rehearings above cited, it is respectfully suggested that the attempt by the Florida Court to require measurement the state of mind of the policymakers as they promulgate a policy in question, was never intended by this Honorable Court. In addition, any such requirement would signal the virtual demise of the Civil Rights Act. Such state of mind could hardly ever be the subject of available proof.



B. SPECIFICALLY

1. PEMBAUR

It would serve no useful purpose, we respectfully submit, to address how the Florida Court was wrong in holding that GENEVA HARRIS could have recovered under the law as it existed before Pembaur, but, not after. To suggest, much less hold, that a state of mind requirement was engrafted by Pembaur onto Section 1983 where there is express, written policy -- to fathom what the policymakers were deliberately choosing from -- is, at best, wrong.

2. THE BASIC CORE CONCEPT COMMON TO MOST 1983 ISSUES -- WHICH SHOULD BE CLEARLY ARTICULATED.

Section 1983 Law, obviously, reflects a compromise of individual rights and the necessity of governmental action. This synthesis is tempered by a conscious and articulated desire not to trivialize the Constitution.



This formulation is implicit and explicit in the ratio decidendi of Daniels.

Daniels v. Williams,
474 U.S. _____, 106 S.Ct. 662,
88 L.Ed.2d 666 (1986)

* * *

. . .Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." Id., at 548-549, 101 S.Ct., at 1919-1920; see also id., at 545, 101 S.Ct., at 1917 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule Parratt to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty or property under the Fourteenth Amendment. (106 S.Ct. at 664-665)

The word "deprive", as a matter of pure grammatical construction, could have been given the interpretation as was articulated in Daniels by Justice Stephens at 106 S.Ct. 680. After all, the syntax

per se of the Constitutional provision does not dictate that "deprive" refer to the actions of the actor, rather than on the harm to the recipient. The majority of the Court chose to adopt the approach of looking more to the actions of the potential depriver. The reason, apparently one of policy -- not to trivialize the Constitution.

Because of this, we respectfully submit that there are two principles which permeate the law and basically transcend other considerations.

(a) When the government acts through agents following pre-established, well defined policy and procedure and such procedures are inadequate to protect the constitutional rights to life, liberty or property, liability should lie.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

A finding of a policy or custom is necessary because it shows that the violation was "neither



random nor unauthorized, but wholly predictable, authorized and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). (Emphasis supplied) (A. 22)

The rationale of holding a city liable when action is pursuant to its procedures is that the city has the time and the resources to draw proper and adequate safeguards. It is not random conduct, but the full power of the city, which could be fully withheld, that is brought to bear on the individual. Liability, therefore, would in no sense be a trivializing of the Constitution.

Daniels v. Williams,
474 U.S. _____, 106 S.Ct. 662
88 L.Ed.2d 662 (1986)

* * *

("The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889)."); Parratt, supra, 541 U.S., at 549, 101 S.Ct., at 1920 (POWELL, J., concurring in result). By requiring the government to follow

appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being "used for purposes of oppression," Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272, 277, 15 L.Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment).

(Emphasis supplied)

(106 S.Ct. at 665)

We submit that the following is most instructive:

Mann v. City of Tucson Dept. of Police,
782 F.2d 790 (9th Cir. 1986)
(Concurring opinion of Sneed, J.)

* * *

I suggest that a satisfactory answer would commence with Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Thus, the first portion of the answer would be that the Parratt analysis is irrelevant to section 1983 claims based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice. The basis for this rule would be that the state has forfeited its opportunity under its procedures to pro-

vide an appropriate remedy for wrongs having the state's own imprimatur.

(Emphasis supplied)

(At p. 798);

(b) An "appropriate procedure" or policy, either for "Fourth Amendment seizure" or Constitutional Due Process is one which adequately protects the rights of individuals, espeically "innocent ones".

We respectfully submit that the American Law Institute's Model Penal Code Section 3.07(2)(b) (Proposed Official Draft, 1962) well sets forth the rule.

MODEL PENAL CODE SECTION 3.07(2)(b)
(PROPOSED OFFICIAL DRAFT 1962)

The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arres-



ted will cause death or serious bodily harm if his apprehension is delayed.

(Emphasis supplied)

For approval of this provision, please see Garner v. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983) (En Banc), affd., Memphis Police Dept. v. Garner, 471 U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985);

3. DANIELS DOES NOT APPLY TO
MUNICIPAL LIABILITY FOR POLICY

Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). The Monell principle, aptly relied upon by the Florida Court in its original opinion, has been in

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no way modified or overruled by Daniels because they each deal with different types of Section 1983 claims.

Parratt v. Taylor makes the seminal distinction between random, unauthorized acts and those done pursuant to State procedure:

Parratt v. Taylor
451 U.S. 527, 543, 101 S.Ct. 1908, 1917,
68 L.Ed.2d 420 (1981)

* * *

[1c] Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . .
(Emphasis supplied)
(At 451 U.S. 543, 101 S.Ct. 1917)

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Parratt v. Taylor, does not, nor does its progeny, Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed. 2d 265 (1982), or Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983), deal with municipal liability. It is, however, possible to extrapolate some very valuable principles from them (which Daniels does not change):

1. There is a substantial difference in the Constitutional sense between actions which are done pursuant to Governmental procedures and those which are not;

2. When Governmental procedures are followed, Governmental liability should then follow when those procedures are inadequate or deficient to protect the individual's Constitutional rights; and

3. The state of mind of the individual actor is important only when established procedure is not followed.

The predecessor for this line of cases was Bonner v. Coughlin, 545 F.2d 565

(7th Cir. 1976) (En Banc). The panel decision was authored by then Judge John Paul Stevens. Subsequent to his leaving that bench, the en banc Court declined to follow his opinion. It is his reasoning, however, which became the ratio decidendi of this Honorable Court.

The distinction between deprivations caused by state procedures and those deprivations caused by actions which are unauthorized, or are in contravention of state regulations, is underscored in another of then Judge Stevens' opinions. The companion case to Bonner, supra, is Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976) (En Banc). The difference between liability for actions pursuant to state procedures and for those not pursuant is underscored therein.

Kimbrough v. O'Neil,
(Panel decision)
523 F.2d 1057 (7th Cir. 1975)
(Concurring opinion of Stevens, J.)

* * *

The focus shifts when we ask



whether there is sufficient state involvement to justify Section 1983 liability. That question is easily answered when, as in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, the harmful conduct is expressly authorized by the State. It is more difficult when the agent's action is not so authorized, but his office has placed him in a position to cause a harm which a private citizen might not have an opportunity to perpetrate. Thus in Bonner, the majority of the panel had no doubt that the prison guards who ransacked the cell were acting under color of state law within the meaning of Section 1983. This conclusion would seem equally valid regardless of whether the guards negligently damaged Bonner's property or deliberately appropriated it. Their private motivation would hardly seem controlling on the state action issue.

(Emphasis supplied)
(523 F.2d at 1065)

In Logan, it was made clear that Parratt did not apply to deny liability where State procedure was followed:

Logan v. Zimmerman Brush Company,
455 U.S. 422, 435- 436,
102 S.Ct. 1148, 1158
71 L.Ed.2d 265 (1982)

This argument misses Parratt's point. In Parratt, the Court

—
—
—

emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 US, at 651, 68 L Ed 2d 420, 101 S Ct 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545, 68 L Ed 2d 420, 101 S Ct. 1908 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. (Emphasis supplied) (455 U.S. 435-436, 102 S.Ct. 1158).

Please note above how the state of mind is immaterial when it is the policy or procedure that is at issue.

In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983) negligent and intentional, unauthorized random acts are put on the same footing.

Hudson v. Palmer,
468 U.S. 517, 533
104 S.Ct. 3194, 3302-3303
82 L.Ed.2d 393 (1983)

* * *

. . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

* * *

. . . For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.
(Emphasis supplied)
(At 468 U.S. 533, 104 S.Ct. 3302-3303)

Thus, under those cases, random, unauthorized negligent or intentional acts could have been the predicate for individual liability. They could have constituted a "deprivation". It is this and only this aspect of Parratt and Hudson that

January 1, 1918
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The first of the year
1918 was marked by a
series of events which
were of great importance
to the people of the
United States. The first
of these was the
passage of the
War Revenue Act of
1917, which provided
for the collection of
taxes on the sale of
liquor, and on the
operation of the
lottery. This act was
passed on October 3, 1917,
and took effect on
January 1, 1918.

The second of the events
of the year was the
passage of the
War Relocation Act of
1918, which provided
for the collection of
taxes on the sale of
liquor, and on the
operation of the
lottery. This act was
passed on October 3, 1917,
and took effect on
January 1, 1918.

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operation of the
lottery. This act was
passed on October 3, 1917,
and took effect on
January 1, 1918.

is overruled by Daniels. Now, a random, unauthorized act which is negligently committed cannot be a predicate for individual liability (a deprivation), while the intentional act can still form such predicate.

We respectfully submit that our analysis as to the effect of Daniels has recently been given judicial imprimatur in Mann v. City of Tucson Dept of Police, supra.

Mann v. City of Tucson Dept of Police,
782 F.2d 790 (9th Cir. 1986)
(Concurring Opinion of Sneed, J.)

* * *

In sum, Daniels and Davidson overruled that portion, and only that portion, of Parratt v. Taylor that held that a negligent loss of property by state officials acting under color of state law was a "deprivation" of property within the meaning of the Due Process Clause of the Fourteenth Amendment. . . .

. . . Therefore, I must be guided by this court's previously mentioned trilogy in which the rather clear message was "Apply Parratt only to random and unauthorized deprivations of pro-

perty by state prison officers."
See Haygood v. Younger, 769 F.2d
at 1357.
(Emphasis supplied)
(At p. 799)

Also instructive is King v. Massarweh,
782 F.2d 825 (9th Cir. 1986).

King v. Massarweh,
782 F.2d 825 (9th Cir. 1986)

* * *

. . . The Supreme Court has over-
ruled Parratt v. Taylor's holding
that negligent deprivations of
property implicate due process
interests. Daniels v. Williams,
____ U.S. ____, 106 S.Ct. 662,
88 L.Ed.2d ____ (1986).

Here, the appellants allege that
they were deprived of liberty
because they were taken into cus-
tody for up to two days and be-
cause personal property was taken
from their apartments. However,
there has been no showing that
these deprivations occurred as a
result of deliberate non-random
state processes.
(Emphasis supplied)
(At p. 828)

In sum, Parratt, Logan, Hudson and
Daniels are all specifically outside of the
area of municipal liability for policy.
They are really not necessary,

individually, or in sum, to decide this case.

We respectfully, however, submit that municipal liability as set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) interfaces smoothly and consistently with Parratt, Zimmerman, Hudson and Daniels. This follows because this Honorable Court in Monell, of course, squarely held that a municipality can only be held liable for its policies and not on a respondeat superior basis for the random, unauthorized acts of its employees.

Monell v. Department of Social Services,
436 U.S. 658, 694-695,
98 S.Ct. 2018, 2037-2038,
56 L.Ed.2d 611 (1978)

* * *

We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

1. The first part of the report is devoted to a general
description of the project and its objectives. It
also includes a brief history of the project and a
summary of the work done to date. The second part
of the report is devoted to a detailed description of
the work done during the last year. This includes
a description of the methods used, the results
obtained, and a discussion of the significance of
the results. The third part of the report is devoted
to a summary of the work done during the last year
and a discussion of the future work. This includes
a description of the methods used, the results
obtained, and a discussion of the significance of
the results. The fourth part of the report is devoted
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obtained, and a discussion of the significance of
the results.

be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see supra, at 660-6 62, and n 2, 56 L Ed 2d, at 616-617, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under Section 1983 may be. We have attempted only to sketch so much of the Section 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.
(Emphasis supplied)
(At 436 U.S. 694-695,
98 S.Ct. 2037-2038)

Therefore as Daniels was not intended, designed, or appropriate to be read into cases dealing with "Monell Policy", The Florida Court clearly misapplied the law.

4. The apparent amalgamation of Pembaur with Daniels by the Florida Court to create a state of mind requirement is pretermitted by Owen v. City of Independence.



In fact, Mrs. Monell would lose under the Florida Court's opinions despite the fact of her proof of a policy that was the moving force of her deprivation. The Florida Court apparently would require Mrs. Monell to prove that: (a) Under that Court's interpretation of Pembaur, the New York policymakers' express policy was actually a "Pembaur policy," one chosen deliberately instead of others ("You must leave work after six months of pregnancy and we did consider three, four, five, seven, and eight months, as well as the possibility of a discretionary review according to your physical condition"); and (b) | Under that Court's interpretation of Daniels, the New York policymakers intended to (or more than negligently) deprive her of her rights when they established the policy. Such "confessions" by the lawmakers in New York is extremely unlikely and certainly was not proven by Mrs. Monell.



In this regard: Daniels and Pembaur address completely unrelated issues (random unauthorized acts versus municipal policy) and cannot co-exist to create a new proposition in the same legal arena. To reiterate, the prosecutor in Pembaur acted in the best of faith, relying upon a statute that was only later declared unconstitutional. The sheriff also kicked the door down in the best of faith, following the good faith instructions of the prosecutor. The dissent in Pembaur states that under the majority opinion even "a non-negligent mistake in judgment" by the policymakers is sufficient to establish municipal liability. (106 S.Ct. at 1307, footnote 4).

Under the Florida Court's apparent amalgamation, recovery would be precluded in Pembaur, because under Daniels the prosecutor did not intend to deprive any rights and did not act more than negligently (or even negligently!). Neither did the

sheriff. Yet, with all of this good faith, and to illustrate the logical nullity of combining Daniels and Pembaur, this Honorable Court found municipal liability in Pembaur.

This state of mind requirement is, we respectfully submit, at complete odds with Owen and serves to highlight the different standards for individual liability (random, unauthorized or otherwise) and municipal culpability.

Owen vs. City of Independence

445 U.S. 622, 650-651,
100 S.Ct. 1398, 1415-1416,
63 L.Ed.2d 673 (1980)

* * *

Our rejection of a construction of Section 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy.

* * *

How "uniquely amiss" it would be, therefore, if the government itself--the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the

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setting of worthy norms and goals for social conduct"--were permitted to disavow liability for the injury it has begotten. See *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. (Emphasis supplied) (At 445 U.S. 650-651, 100 S.Ct. 1415-1416)

5. The deadly force policy of the CITY OF MIAMI may well have been unconstitutional per se because it justified HARRIS' seizure by the use of deadly force when both she and the fleeing suspect were unarmed and the use of deadly force was mandated by the City policy.

This would be by way of Fourth Amendment or by Due Process.

A strong argument can be made that GENEVA HARRIS was "seized." Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Jamieson v. Shaw, 772 F.2d 1205, (5th Cir. 1985); Pruitt v. City of Montgomery, 771 F.2d 1475 (11th Cir. 1985).

In Memphis Police Department v. Garner, 471 U.S.____, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Honorable Court squarely upheld the United States Court of Appeals determination that the use of force in circumstances such as herein was not permissible. Florida is mentioned in Footnote 14 at 105 S.Ct. 1704 as following the common law rule on deadly force, which was specifically found to be Constitutionally impermissible.

The CITY OF MIAMI adopted state law on the use of firearms and other aspects of deadly force.

Operational Orders City of Miami
Police Department



* * *

In accordance with those laws of the State of Florida and 1971 Op. Attorney General, 071-4 1, March 22, 1971, the MIAMI POLICE DEPARTMENT establishes the following:

a. A police officer has the authority to use deadly force to apprehend a fleeing felon, whether the felon is armed or unarmed, or whether the felony involved is one against a person or one against property.

. . .

Garner involved the rights of a fleeing felon and not those of an innocent bystander. It was a Section 1983 action by the felon, and the Court of Appeals utilized Fourth Amendment and due process analysis, while this Honorable Court appears to only have considered the Fourth Amendment aspect. It is hard to imagine that the rights of the felon are greater, rather than equal to, or less than, that of an innocent bystander. Therefore, although there may not have been a seizure of the decedent herein within the Fourth Amendment, there is certainly a lack of due



process attendant upon the deprivation of her liberty and the taking of her life, sans process.

Garner vs. Memphis Police Dept.,
710 F.2d 240 (6th Cir. 1983) (En Banc)

* * *

An analysis of the facts of this case under the Due Process Clause of the Fourteenth Amendment leads us to a similar result. That clause prohibits any State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts.
(Emphasis supplied)
(At p. 246)

* * *

The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons:

The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace

officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code Section 3.07(2)

(b) (Proposed Official Draft, 1962).

(Emphasis supplied) (At p. 247)

It must be remembered that the full policy of the CITY OF MIAMI, including that on the use of deadly force, was held to be:

(a) one of "reckless disregard for human life" and

(b) one that failed to take into account danger to innocent third parties. It must also be remembered that this policy "mandated" the use of deadly force herein.

CONCLUSION

It is respectfully submitted that the use of "adequate" and "inadequate" are proper nomenclature to describe permissible and impermissible Section 1983 municipal policy parameters.

Bartholomew v. Fischl,
782 F.2d 1148 (3d Cir. 1986)

* * *

See, e.g., Brandon v. Holt,
_____, U.S. _____, 105 S.Ct.
873, 83 L.Ed.2d 878 (1985)
(reversing finding of no
municipal liability where
plaintiff showed existence
of a policy of police pro-
cedures inadequate to dis-
cover officer misconduct);
Czurlanis v. Albanese, 721
F.2d 98 (3d Cir. 1983)
(imposing municipal liabi-
lity based upon policy re-
quiring that city employees'
complaints be passed up
"chain of command"); Black
v. Stephens, 662 F.2d 181,
191 (3d Cir. 1981) (holding
city liable because of policy
delaying investigation of com-
plaints of police misconduct
until underlying charges
against complainant were
resolved). . . .
(Emphasis supplied)
(At p. 1153)

MEMORANDUM

TO : The President
FROM : The Secretary
SUBJECT: [Illegible]

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Please see Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1984); Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982).

Thus, a finding of the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure the policies of governmental bodies. Moreover, these terms are neutral as to degrees of care and do not connote "negligence", "willfulness" or any other state of mind, as well they should not.

It is respectfully submitted that a policy is either adequate or inadequate to protect the constitutional rights of the individual. This is, of course, a measuring device which balances the governmental activity and the availability and use of safeguards to carry out that activity in light of the public's right to be secure in their persons and property.

It is respectfully prayed that this Honorable Court issue its Writ of

Certiorari to the Florida Court as this case is deserving of full consideration.

Respectfully submitted,

FELDMAN & LEVY, P.A.
Counsel for the Petitioner
GENEVA HARRIS, etc.
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone No. (305)374-0007

BY: Donald Feldman
DONALD FELDMAN

Dated: October 14, 1986



CERTIFICATE OF SERVICE

I, DONALD FELDMAN, being over the age of 18 years, hereby certify that I have this fourteenth day of October, 1986, served three copies of the foregoing Petition For Writ of Certiorari to the District Court of Appeal, Third District to all counsel of record listed below with their mailing addresses, by mailing said copies in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, Miami, Florida.

Lucia A. Dougherty, City Attorney
City of Miami Law Department
169 E. Flagler Street, #1101
Miami, Florida 33131; and

Thomas M. Pflaum, Esq.
Simon, Schindler, Hurst
& Sandberg
1492 South Miami Avenue
Miami, Florida 33130.

FELDMAN & LEVY, P.A.
Counsel for Petitioner

By: Donald Feldman
Donald Feldman

86-640

2

Supreme Court, U.S.
FILED

OCT 14 1986

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GENEVA HARRIS, as Personal
Representative of the Estate
of Doretha a/k/a Dorothea Rolle,
Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

City of Miami v. Harris, 490 So.2d 69
(3d DCA 1985)

DONALD FELDMAN
FELDMAN & LEVY, P.A.
Counsel for the Petitioner,
GENEVA HARRIS, etc.
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305)374-0007

18/1/87



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IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1986

MONDAY, JULY 14,
1986

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679

84-2525

GENEVA HARRIS, as **

85-1352

Personal Representa- **
tive of the Estate **

of Doretha a/k/a **

Dorothea Rolle, **

Deceased, **

Appellee. **

Upon consideration, the appellee's
motion for rehearing and/or clarification
and/or certification is denied. The
appellant's motions for extension of time
to respond and to strike are denied as
moot.

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ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: /s/
Deputy Clerk

cc: David Lawrence Magidson
Donald Feldman
Lucia Allen Dougherty
Thomas M. Pflaum

/hb



IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679
84-2525
85-1352

GENEVA HARRIS, as **
Personal Representa-
tive of the Estate **
of Doretha a/k/a
Dorothea Rolle, **
Deceased, **

Appellee. **

Opinion filed June 3, 1986.

Appeals from the Circuit Court for
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,
and Gisela Cardonne, Deputy City Attorney;
Simon, Schindler, Hurst & Sandberg and
Thomas M. Pflaum, for appellant.

Feldman & Levy and Donald Feldman;
Abramson & Magidson, for appellee.

Before BARKDULL, NESBITT and DANIEL S.
PEARSON, JJ.



ON SECOND MOTION FOR REHEARING

PEARSON, DANIEL, Judge.

This second opinion on rehearing is in response to the motion of the plaintiffs-appellees. They complain that in the first rehearing (sought by the defendant-City) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, we note that in the still more recently decided case of Pembaur v. Cincinnati, ____ U.S. ____,



_____, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.

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IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM,
A.D. 1986

WEDNESDAY, APRIL 9,
1986

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as **

Personal Representa- **

tive of the Estate **

of Doretha a/k/a **

Dorothea Rolle, **

Deceased, **

Appellee. **

**

Upon consideration of appellee's motion to vacate order on rehearing, or alternatively, motion to stay issuance of mandate and motion for extension of time to file rehearing motions, it is ordered that the motion to vacate order on rehearing is denied; appellee's motion for



extension of time to file motion for rehearing is granted, and the motion for rehearing shall be filed on or before 15 days from the date hereof.

A True Copy

ATTEST:

/s/
Clerk District Court of
Appeal, Third District

cc: Lucia A. Dougherty
Thomas M. Pflaum
David L. Magidson
Donald Feldman

/hb



IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

THE CITY OF MIAMI,	**	
Appellant,	**	
vs.	**	CASE NOS. 84-1679
		84-2525
GENEVA HARRIS, as	**	85-1352
Personal Representa-	**	
tive of the Estate	**	
of Doretha a/k/a	**	
Dorothea Rolle,	**	
Deceased,	**	
Appellee.	**	

Opinion filed April 1, 1986.

Appeals from the Circuit Court for
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,
and Gisela Cardonne, Deputy City Attorney;
Simon, Schindler, Hurst & Sandberg and
Thomas M. Pflaum, for appellant.

Feldman & Levy and Donald Feldman;
Abramson & Magidson, for appellee.

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Before BARKDULL, NESBITT and DANIEL S. PEARSON, JJ.

ON REHEARING

PEARSON, DANIEL, Judge.

In the month following the release of our opinion in this case and while the appellant's timely-filed motion for rehearing pended, the United States Supreme Court, overruling its prior contrary holding,^{1/} decided that mere negligence by a state official can no longer be said to "deprive" an individual of life, liberty or property under the Fourteenth Amendment and thus support a claim for relief under Title 42, United States Code, Section 1983. See Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Since it is apodictic that where there is a change of law between the trial of a case and the final disposition of the appeal, the

appellate court must apply the law as it exists at the time of final disposition,^{2/} see, e.g., Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Florida East Coast Railway Co. v. Rouse, 194 So.2d 260 (Fla. 1967); Weissman v. State Farm Mutual Automobile Insurance Co., 349 So.2d 749 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1221 (Fla. 1978), we must now examine the judgment against the City in light of Daniels.

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than

negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

As we noted in our initial opinion, the jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and did not allocate the damages to either the common-law negligence or the Section 1983 count of the complaint. So long as the Section 1983 action was affirmable (and until Daniels it was), the fact that the verdict was undifferentiated was of no



consequence to the plaintiffs-the two-issue rule prevented the City from arguing that the verdict related to the common-law negligence count only.

Now, however, the verdict on the Section 1983 action cannot be sustained, and the plaintiffs are left with a \$595,000 judgment relating to the common-law negligence count only. Because, again, as we noted in our initial opinion, see slip opinion p. 3 n. 3, the common-law negligence count will not support an award of attorneys' fees and the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute clearly apply to the common-law negligence count, the elimination of the Section 1983 count, unlike the elimination of the common-law negligence count, will severely and adversely affect the plaintiffs.



We can, of course, affirm the judgment as to liability on the common-law negligence count, and we again do so. However, because the \$595,000 amount clearly is a cumulative amount relating to both causes of action, we must remand for a new trial on damages only on the common-law negligence count.

We must reverse the judgment on the Section 1983 count and the consequent award of attorneys' fees. Consistent with the principle that where there has been a change in the law between trial and appeal which necessitates a reversal, the case should be remanded for a new trial under the new law, we remand for a new trial on both liability and damages on the Section 1983 count. As we noted in Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983), where a party's failure of proof (there the failure to

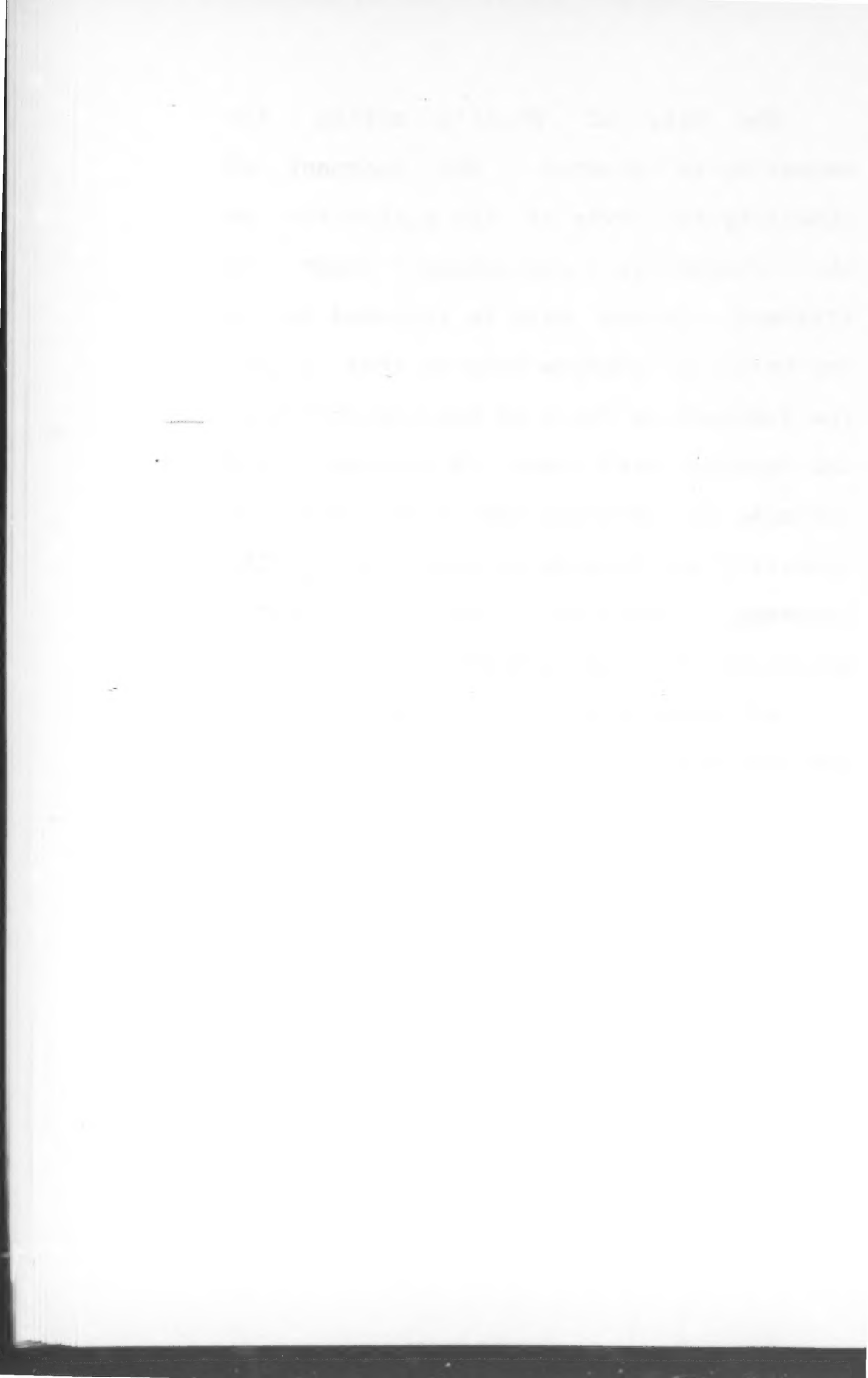


elicit independent proof of the corporation's fault to sustain a punitive damage judgment against the corporation) is attributable to the party proving only that required by the law at the time of trial, the other side will not "receive a windfall merely because the law has changed between trial and appeal," but instead the adversely affected party will have an opportunity to supply the missing proof upon a retrial of the case.^{3/} Similarly, the present plaintiffs tried the case, under Parratt, on the premise that a showing of the City's negligence in adopting its policy in regard to police chases was enough to prove a Section 1983 violation. They should be given the opportunity, under Daniels, to prove the "more than negligence" that Daniels requires.^{4/}



The City of Miami's motion for rehearing is granted. The judgment of liability in favor of the plaintiffs on the common-law negligence count is affirmed, and the case is remanded for a new trial on damages only on that count. The judgment in favor of the plaintiffs on the Section 1983 count is reversed, and the case is remanded for a new trial on liability and damages on that count. The judgment awarding the plaintiffs attorneys' fees is reversed.

Affirmed in part; reversed in part, and remanded.



FOOTNOTES

- 1/ See Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).
- 2/ Where the change in law would cause a general upheaval in pending litigation, the rule is otherwise. In the "general upheaval" cases, the new rule of law applies only to (1) cases in which it has been applied, (2) cases where trial has not yet begun, (3) cases on appeal where the applicability of the new rule has been preserved as a question for appellate review, (4) cases in which trial has begun or in which verdict or judgment has been entered but the applicability of the new rule was properly raised during some stage of the litigation, and (5) quite obviously, cases not yet commenced. See Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977) (applying newly adopted doctrine of strict liability); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) (discussing application of new principals of comparative negligence). In our view, the Daniels decision will not cause a general upheaval in litigation.
- 3/ The fact that a party, unlike the plaintiffs here, could have anticipated the coming change in the law does not necessarily prevent the rule from applying. See Weissman v. State Farm Mutual Automobile Insurance Co., 349 So.2d at 750. n. 1.



4/ In Daniels, the plaintiff conceded that the state officer was at most negligent. Accordingly, the Supreme Court, as it expressly noted, did not decide "whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause." Daniels v. Williams, 474 U.S. at _____ n. 3, 106 S.Ct. at 667 n. 3, 88 L.Ed.2d at 670 n. 3. This question likely will have to be answered by the trial court upon retrial of this case.



IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, 1985

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as **

Personal Representa- **

tive of the Estate **

of Doretha a/k/a **

Dorothea Rolle, **

Deceased, **

**

Appellee.

**

Opinion filed December 17, 1985.

Appeals from the Circuit Court for
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,
and Gisela Cardonne, Deputy City Attorney,
for appellant.

Feldman & Levy and Donald Feldman;
Abramson & Magidson, for appellee.

Before BARKDULL, NESBITT and DANIEL S.
PEARSON, JJ.



PEARSON, DANIEL, Judge.

When police officers of the City of Miami, in high-speed pursuit of a vehicle being driven by a suspected burglar down a congested street, rammed the fleeing suspect's car, locked fenders with it, and forced it off the road into a bus bench on which Mrs. Doretha Rolle was sitting, Mrs. Rolle was killed. Geneva Harris, Mrs. Rolle's mother and personal representative, brought an action against the City on behalf of the estate and Mrs. Rolle's three minor children, alleging that the City's police officers were negligent and, in a separate count brought under the authority of Title 42 United States Code, Section 1983, that the City's unreasonable policy in regard to pursuit of law violators deprived Mrs. Rolle of her constitutionally

guaranteed rights.^{1/} A jury returned a verdict for the plaintiffs, finding that the negligence of its officers (for which the City was responsible through the doctrine of respondeat superior) and the City's "inadequate policy in regard to police chases" both were the legal causes of Mrs. Rolle's death. The jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and did not allocate the damages to one or the other causes of action. The trial court entered judgment on the verdict and, after separate hearing, awarded the plaintiffs' attorneys \$100,000 in fees under the authority of Title 42 United States Code, Section 1988, which, inter alia, authorizes the award of attorneys' fees to parties prevailing under Section 1983.^{2/} The City appeals.

We affirm the judgment entered on the jury's verdict. We reverse the judgment for attorneys' fees and remand that issue to the trial court for further proceedings and consideration.

The City contends that (1) the plaintiffs failed to sufficiently prove a custom or policy on the part of the City requisite to a finding of liability under Title 42 United States Code, Section 1983; (2) there was not a sufficient predicate to admit the testimony of the plaintiffs' expert on police procedures; (3) the award of attorneys' fees was improper in that (a) the verdict form does not reflect that the plaintiffs were awarded damages for a violation of Section 1983 rather than common law negligence, and (b) it was not supported by substantial competent evidence; and (4) the trial court incorrectly instructed the jury.^{3/} In our

view, only the first three of these contentions merit any discussion.

Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation."^{4/} Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). A finding of a policy or custom is necessary because it shows that the violation was "neither random nor unauthorized but wholly predictable, authorized and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). "Proof of a single incident of unconstitutional activity is not

sufficient to impose [municipal] liability,. . .unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy which policy can be attributed to a municipal policymaker." Oklahoma City v. Tuttle, ____ U.S. ____, ____, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791, 804 (1985).

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the public or the

officer.^{5/} The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). There the jury found that the defendant-City was grossly negligent in the training of its officers and that, as a result of this negligence, its officers engaged in a shooting barrage which resulted in the death of an innocent victim. The court wrote that:

"[i]f there is a reckless disregard for human life and safety prevalent among the city's police officers which



threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights. Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force is satisfied."

767 F.2d at 170.

Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and

safety of innocent persons would meet with the approval, and indeed was required by, the City policymakers. As such, municipal liability under Section 1983 was adequately shown. See also Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985) (where police set up deadman roadblock to stop driver of car who sped up and would not stop for police, and who, though known to have mental problems, did not have outstanding arrest warrants, innocent passenger in chased car injured when car crashed into roadblock had standing to sue municipality based on allegation that the police had a practice of ignoring the Fourth Amendment proscription against unreasonable seizures). Accord Trezevant v. Tampa, 741 F.2d 336 (11th Cir. 1984) (where plaintiff's wrongful incarceration resulted from procedures which failed to



protect constitutional rights, municipal liability is warranted).

The City next argues that the trial court should not have allowed an expert on police procedures called as a witness by the plaintiffs to testify about a safe pursuit policy used by Metropolitan Dade County (a) because the greater size of Dade County's police force (with which the expert was not previously familiar) made its policies not probative of the appropriate City of Miami Policy, and (b) because the expert had not listened to the tape of the chase, had not traveled the route of the chase during the same hours or under the same weather conditions, and had no information as to the condition of the police vehicles or the fleeing suspect's vehicle. The record reflects, however, that the expert testified that the difference in size between the two

police forces would not in any way affect his opinion, and that he read the transcript of the chase and the testimony of the officers involved, and drove the route of the chase. In our view, any difference between the conditions and the expert's lack of detailed knowledge of the vehicles falls far short of establishing that the expert lacked a sufficient basis for his opinion that the duration and speed of the chase at night on well-populated streets was in reckless disregard of the safety of the public. Cf. Husky Industries, Inc. v. Black, 434 So.2d 998, 993 (Fla. 4th DCA 1983); { 90.705(2), Fla.Stat. (1983). The trial court did not abuse its discretion in ruling that the expert's testimony was admissible.

Lastly, we turn to the City's challenge to the attorneys' fee award.

The City contends that the trial court erred by failing to require the jury to apportion the damages found between the negligence and the Section 1983 counts. The City argues that had the jury attributed all of the damages to the common-law negligence count, no attorneys' fee award whatsoever would be permissible. We find, however, that the City failed to preserve this point for appeal when it acquiesced in the verdict form used and failed to request a special verdict form. See Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980); Abrams v. Paul, 453 So.2d 826 (Fla. 1st DCA 1984). Even as a general verdict must be upheld where there is no error as to at least one of the issues upon which the verdict may have been founded, Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978), so too the attorneys' fees

The first thing I noticed when I stepped
out of the car was the smell of the
city. It was a mix of old and new,
of history and progress. The air was
thick with the scent of coffee and
the sound of the city was a symphony
of horns and honks. I walked down
the street, feeling the pulse of the
city in my veins. The people were
friendly and the food was delicious.
I had found a new home.

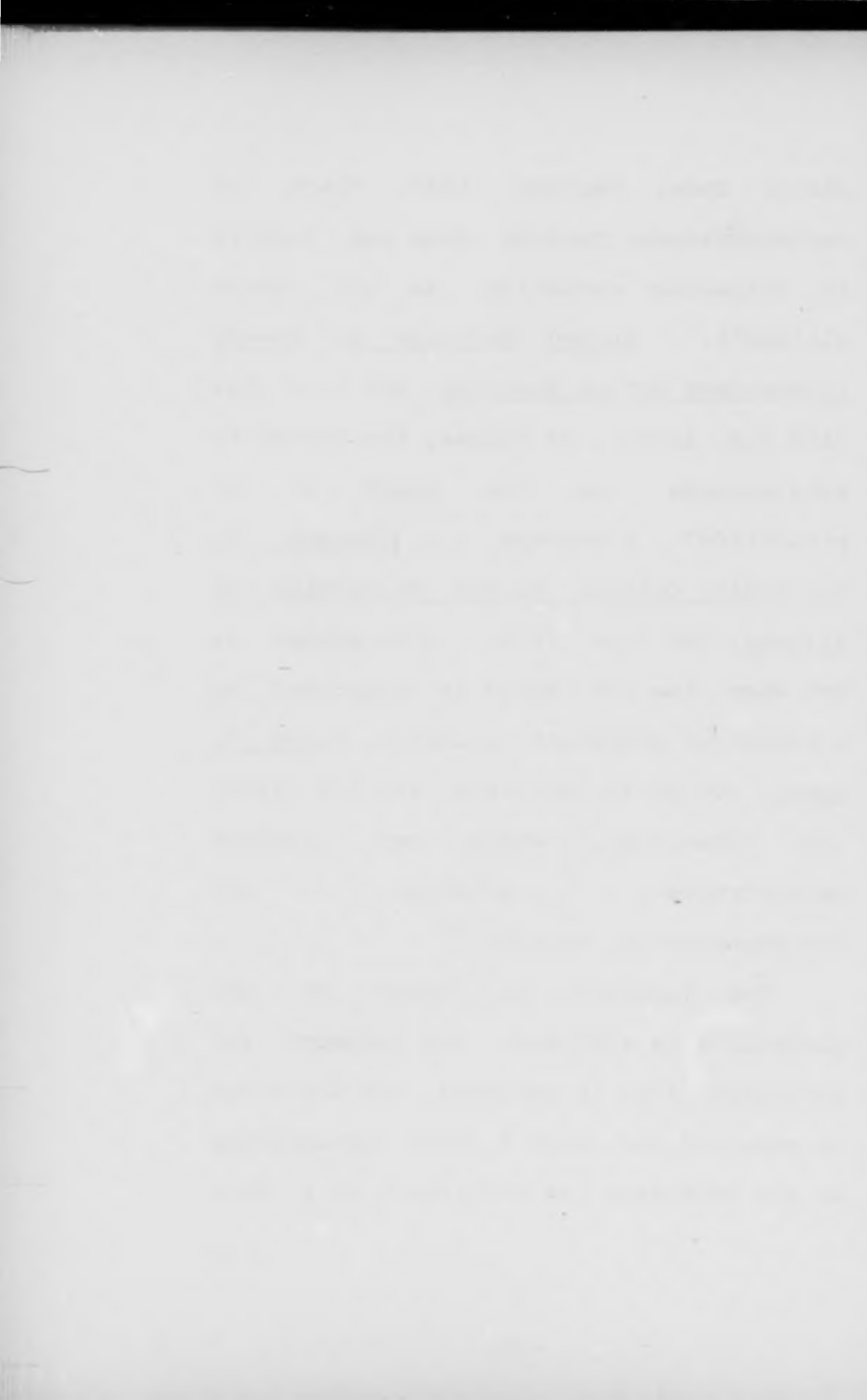
award here must be upheld where it is impossible to ascertain from the verdict form that the damages were not awarded on the count--Section 1983--that would support an attorneys' fee award. Cf. Barhoush v. Louis, 452 So.2d 1075 (Fla. 4th DCA), pet. for rev. disp., 458 So.2d 271 (Fla. 1984).

Although we have concluded that the verdict as returned will support an attorneys' fees award, we nonetheless must remand the cause for further proceedings respecting the award. Where a trial court awards attorneys' fees to a prevailing party under Section 1988, Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), mandates that the court set forth certain specific findings concerning its fee determination. Because here the trial court did not make these required findings, we must remand the

cause for such purpose, and if the trial court deems it necessary, for further proceedings to determine the appropriate fee. We are aware from the record before us that plaintiffs' attorneys did not make contemporaneous records reflecting their labors on the case. Despite the City's urging to the contrary, this omission is not fatal or even necessarily detrimental to their claim. As the Florida Supreme Court stated in Florida Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985), although "[i]nadequate documentation may result in a reduction in the number of hours claimed. . .," reduction is not required. See Johnson v. University College of the University of Alabama, 706 F.2d 1205, 1207 (11th Cir. 1983), cert. denied, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983) (in proceeding for attorneys' fees under Title 42 United

States Code, Section 1988, "lack of contemporaneous records does not justify an automatic reduction in the hours claimed"). Accord Harkless v. Sweeny Independent School District, 608 F.2d 594 (5th Cir. 1979). Of course, the burden to substantiate the fee award is on plaintiffs' attorneys. Johnson v. University College of the University of Alabama, 706 F.2d 1205. That burden is met when the fee award is supported by substantial competent evidence, Cohen v. Cohen, 400 So.2d 463 (Fla. 4th DCA 1981) (on rehearing), which may include reconstructed, although not contemporaneous, records.^{6/}

The judgment in favor of the plaintiffs is affirmed. The judgment for attorneys' fees is reversed, and the cause is remanded for such further proceedings as are necessary and consistent with this



opinion on the issue of attorneys' fees.

Affirmed in part; reversed in part,
and remanded.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

CHICAGO, ILL.

1

FOOTNOTES

- 1/ State courts have concurrent jurisdiction to entertain causes of action brought under Title 42 United States Code, Section 1983. *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). That section provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

- 2/ Title 42 United States Code, Section 1988, provides in pertinent part:

"In any action or proceeding to enforce a provision of section. . . 1983. . . of this title, . . . the court, in its discretion, may allow the prevailing

party. . .a reasonable
attorney's fee as part of
the costs."

The attorneys' fee provision of Section 1988 applies to actions brought under Section 1983 in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

- 3/ This court must reach the question of the City's liability under Section 1983 regardless of the resolution of the common law negligence count because (a) attorneys' fees may be awarded under the Section 1983 count but not under the common law negligence count, and (b) the City implicitly concedes that the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute, see { 768.28(5), Fla.Stat. (1983), clearly applicable to the common law negligence count, do not serve to reduce any recovery under the Section 1983 count.
- 4/ To establish individual-as distinguished from municipal--liability under Section 1983, a plaintiff need show only that the defendant (1) acted under color of state law, and (2) deprived the plaintiff of a constitutional right. This lawsuit and appeal do not involve any claim against an individual police officer.
- 5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and

regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, _____ U.S. _____, 105 S.Ct. 2427, 85 L.Ed.2d 791.

- 6/ The City's reliance on Mercy Hospital v. Johnson, 431 So.2d 687 (Fla. 3d DCA), pet. for rev. denied, 441 So.2d 632 (Fla. 1983), to defeat the attorneys' fee award, is misplaced. In Mercy Hospital, there were no records at all to support the attorneys' claimed hours, and the number of hours claimed was found to be inherently incredible.

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE
OF THE STATE OF
NEW YORK
FOR THE YEAR
1887

THE LAND OFFICE
OF THE STATE OF
NEW YORK
HAS THE HONOR
TO ACKNOWLEDGE
THE RECEIPT OF
THE FOLLOWING
SOURCES OF
REVENUE
FOR THE YEAR
1887

—

42 U.S.C. Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. {1979; Pub.L. 96-170, {1, Dec. 29, 1979, 93 Stat. 1284.

It is a very old and well known fact that the
people of the world are not all of the same race.

There are many different races of people in the world, and each race has its own characteristics. Some races are taller and stronger than others, and some are more intelligent than others. But all races are human, and all have the same rights and responsibilities. It is important for us to understand and respect the differences between races, and to work together to create a better world for everyone.

There are many different races of people in the world, and each race has its own characteristics. Some races are taller and stronger than others, and some are more intelligent than others. But all races are human, and all have the same rights and responsibilities. It is important for us to understand and respect the differences between races, and to work together to create a better world for everyone.

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.030. Jurisdiction of Courts

(a) Jurisdiction of Supreme Court

(1) Appeal Jurisdiction.

(A) The Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of death;1/

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.2/

(B) When provided by general law, the Supreme Court shall review:

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;3/

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.4/

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:5/

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;



(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the Supreme Court, and:6/

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States Court of Appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.7/

(3) Original Jurisdiction. The Supreme Court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction; and may issue writs of mandamus and quo warranto to state officers and state agencies. The Supreme Court or any justice may issue writs of habeas corpus returnable before the Supreme Court or any justice, a district court of appeal or any judge thereof, or any circuit judge.8/

[Footnotes Omitted]

FLORIDA STATUTES, SECTION 768.28 (1980)

Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusion.

...(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$50,000 or any claim or judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$50,000 or \$100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974....

FLORIDA STATUTES, SECTION 768.28 (1983)

Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusion.

...(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$100,000 or \$200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974....

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679

84-2525

GENEVA HARRIS, as **

85-1352

Personal Representa-

tive of the Estate **

of Doretha a/k/a

Dorothea Rolle, **

Deceased, **

Appellee. **

**

APPELLEE'S MOTION TO VACATE ORDER ON
REHEARING, OR ALTERNATIVELY, MOTION TO
STAY ISSUANCE OF MANDATE AND FOR EXTENSION
OF TIME TO FILE REHEARING MOTIONS

I. MOTION TO VACATE ORDER ON REHEARING
FOR WITHDRAWAL OF OPINION AND FOR
FURTHER BRIEFING AND/OR ORAL
ARGUMENT.

1. This Motion, asking this
Honorable Court to vacate its Order filed
April 1, 1986 and withdraw its Opinion on
rehearing is premised upon Appellee's firm
belief that the notions of fundamental

DECLARATION OF THE
INDEPENDENCE OF THE
UNITED STATES OF AMERICA
1776

When in the course of the human events,

it becomes necessary for one people to

assume the separate and equal station

among the powers of the earth,

it is their right

to declare the causes which impel them
to the separation. We hold these truths
to be self-evident, that all men are
created equal, that they are endowed
with certain unalienable rights, that
among these are life, liberty and the
pursuit of happiness.

That to secure these rights, Governments
are instituted among Men, deriving
their just powers from the consent of
the governed.

That whenever any Form of Government

becomes destructive of these ends, it
is the right of the People to alter or
to abolish it, and to institute new
Government, laying its foundation on
such principles and organizing its
powers in such form, as shall seem
them most likely to promote their
Safety and Happiness.

Prudence, in such a case, may dictate
temporizing measures, and a gradual
approach to the full separation. But
when a long train of abuses and
usurpations, pursuing the same
object, evinces a design to reduce
them to absolute Tyranny, it is their
right, it is their duty, to throw off
such Government, and to provide new
Guards for their future Security.

That the United States, by the
consent of the thirteen original
States, do hereby sever themselves from
all political connection with Great
Britain, and that as free and
independent States, they do hereby
declare their independence of Great
Britain, and that as free and
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fairness and equity, whereby Appellee has never been given an opportunity to comment upon or discuss the recent United States Supreme Court decision of Daniels vs. Williams, 474 U.S. _____, 106 S.Ct. _____, 88 L.Ed.2d 662 (1986), call for and mandate an order granting the relief requested herein, this particularly in light of:

A. Appellant's filing of a motion for rehearing which, as Appellee points out in its Response to Motion for Rehearing, is believed to be improper in that said motion argued with the merits of the Court's order, attacked the Court's order and raised new matters for the first time in the proceedings;

B. Appellant's filing of a Notice of Supplemental Authority on January 29, 1986 which cited, for the first time to four cases decided between

1974 and 1980 which were not discussed in Appellant's brief, nor at oral argument in clear violation of Rule 9.330, Florida Rules of Appellate Procedure;

C. Appellant's unilateral decision to bring unauthorized and ex parte argument before this Honorable Court by filing a four page document on January 29, 1986, entitled "Supplemental Memorandum". Said document refers to the recent Supreme Court decision, Daniels, supra, said to be dispositive of the case at bar;

D. Appellee being placed in the detrimental position of not having an opportunity to comment upon, analyze or discuss Daniels, supra, due to the unavailability of a mechanism under the Florida Rules of Appellate Procedure which would sanction Appellee's initiation of such a discussion.



2. It is respectfully submitted that facially and without any detailed probing or analysis, there are several problems or issues that appear to be generated by the Honorable Court's current opinion. These will be pointed out and then briefly touched upon herein, in the hope this Honorable Court will grant the relief requested and set this matter down for the filing of supplementary briefs and oral argument so that a fully informed decision can be reached on the applicability of the Supreme Court decision to the instant case.

Furthermore, subsequent to its decision in Daniels, supra, the Supreme Court decided Pembaur v. City of Cincinnati, ____ U.S. ____, 54 L.W. 4290 (March 25, 1986), and Appellee respectfully submits that an informed decision in the case at bar necessitates a



Careful review of this most recent Supreme Court decision on municipal liability under Title 42 U.S.C. Section 1983. (Annexed hereto for the convenience of this Honorable Court is a copy of Pembaur v. City of Cincinnati, supra).

3. One of the very real problems generated by this Honorable Court's opinion on rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policymakers (if so, how many of them) is the test to be applied or is it holding that the standard is the import of the policy itself?

We respectfully submit that this problem is not addressed by this Honorable Court and the language of the opinion itself engenders confusion.



THIS HONORABLE COURT'S OPINION ON
REHEARING
April 1, 1986

* * *

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient. (Emphasis supplied) (At pp. 2-3)

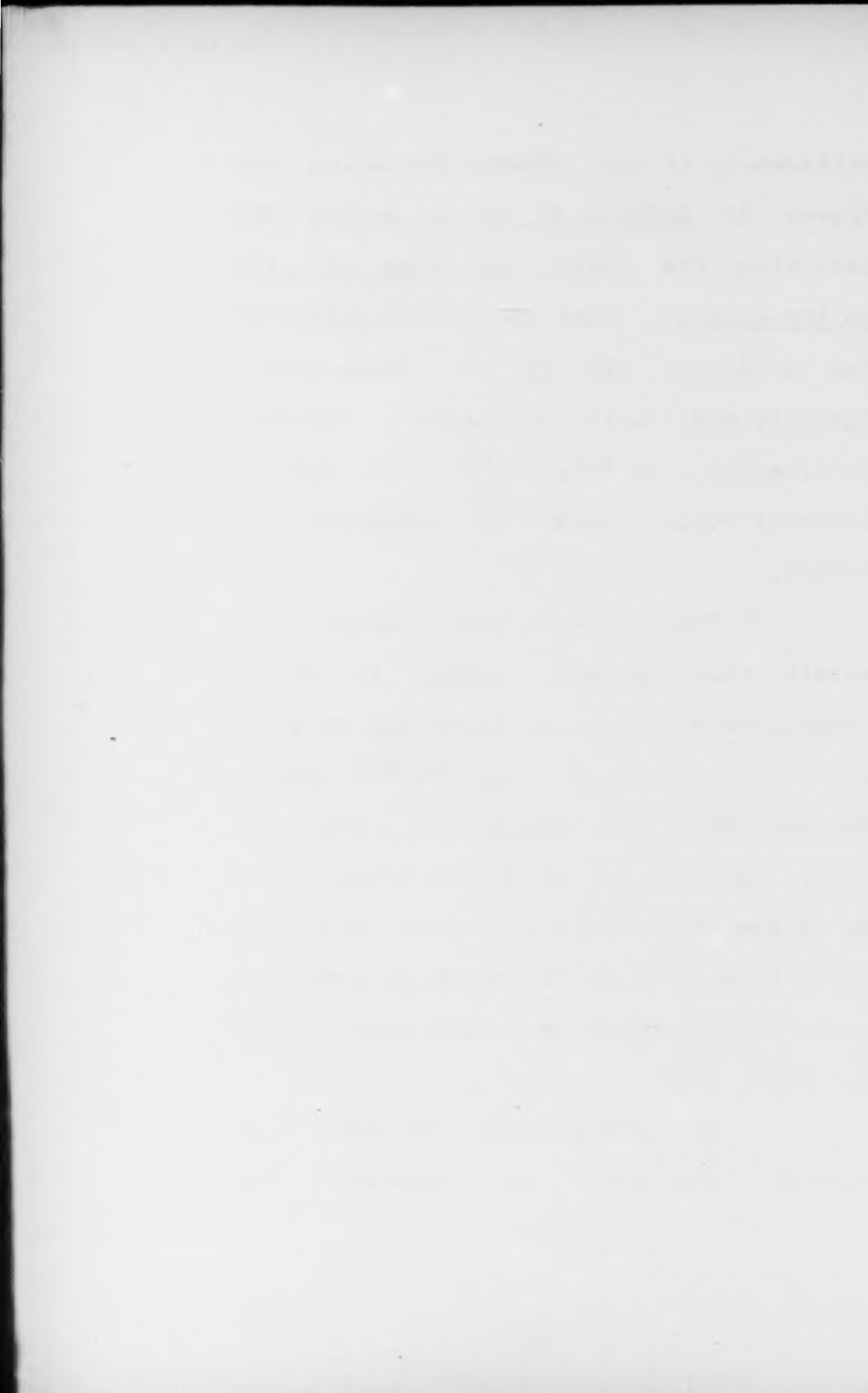
Thus, a most difficult problem is facially engendered by this Honorable Court's Opinion on Rehearing as to the



difference, if any, between measuring the degree of deficiency of a policy and measuring the state of mind of the policy-makers. What is to be measured? Can a POLICY PER SE be "negligent", "grossly negligent", "reckless", "grossly indifferent", or "willful"? The English language would appear to pretermitt the latter.

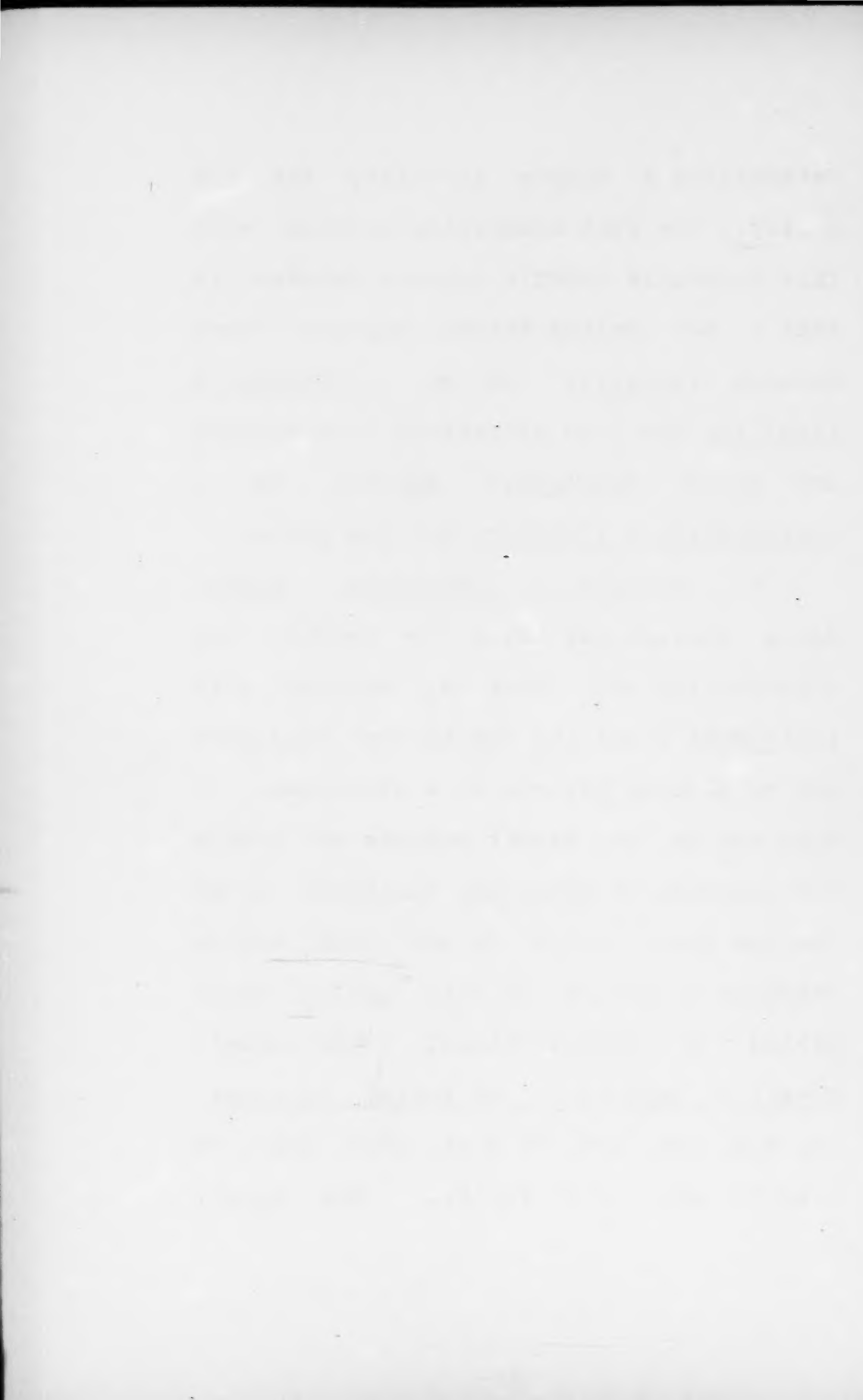
Even though, we respectfully submit that Daniels, supra, is wholly inapplicable herein, to leave the quagmire said to be made by the United States Supreme Court in Daniels v. Williams, supra, and pass it on to the trial court by virtue of Footnote 4 of this Honorable Court's Opinion, is to invite endless more years of litigation in a case long overdue for final rest.

We respectfully submit that neither standard is correct for



determining a city's liability for its policy. The real underlying problem with this Honorable Court's current Opinion is that a new United States Supreme Court Opinion (Daniels) on an individual's liability has been mistakenly (and without any ratio decidendi) applied to a municipality's liability for its policy.

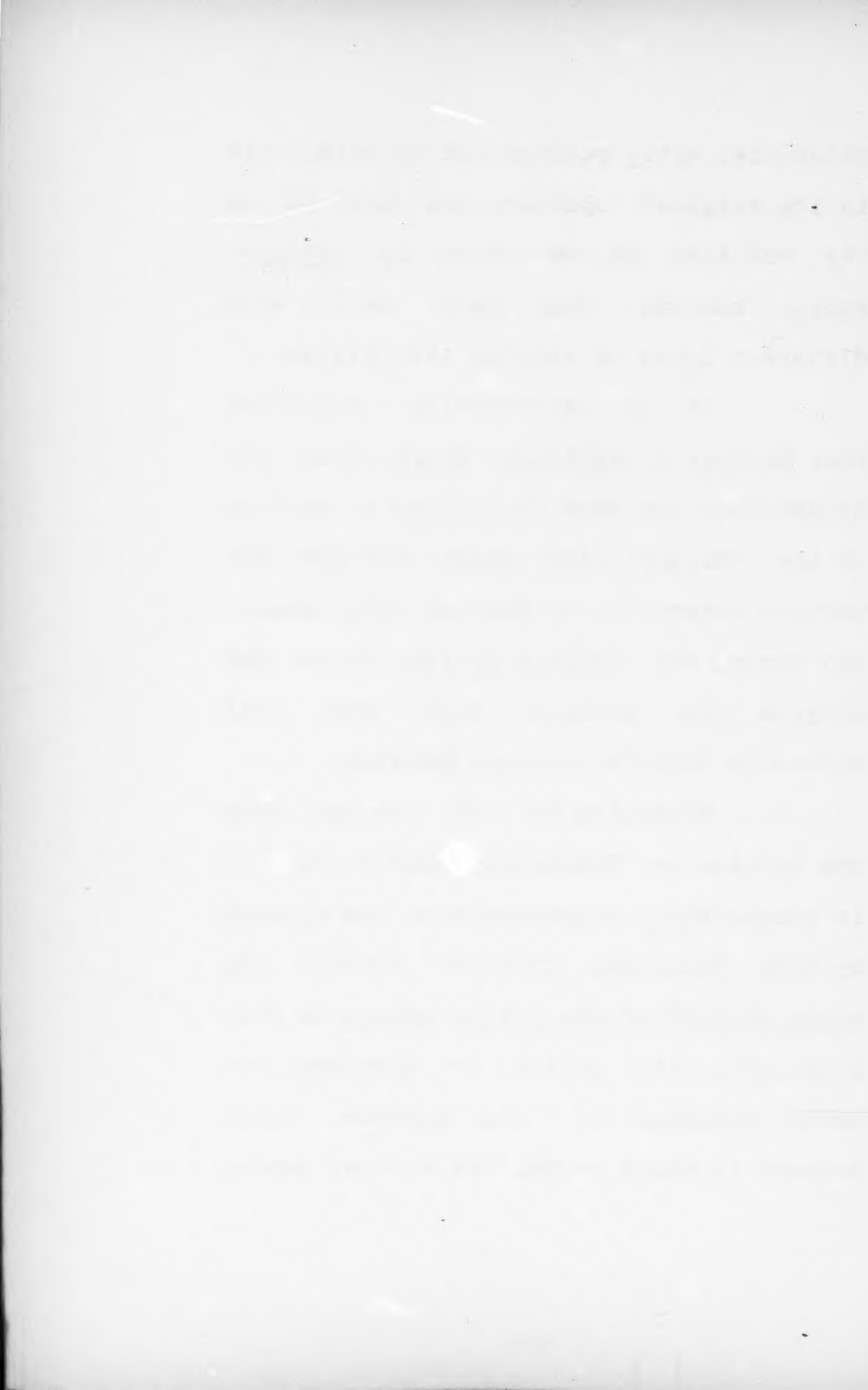
4. Daniels v. Williams, supra, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). The Monell



principle, aptly pointed out by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.

It is respectfully submitted that Daniels v. Williams, supra, does not necessitate nor does it license a marring of the "Bright Line" which divides the various categories of Section 1983 cases, and hence, the Daniels ruling, in no way affects the present case and this Honorable Court's original holding.

5. Referring to the excerpt from the Opinion on Rehearing cited above, it is respectfully suggested that the attempt by this Honorable Court to measure the state of mind of the policy-makers as they promulgate the policy in question was never intended by the Supreme Court because it would signal the virtual demise



of the Civil Rights Act as such state of mind could hardly ever be the subject of available proof. The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/individual's actions, is whether or not an authorized policy, when executed, results in an unconstitutional act. See, e.g., Pembaur, supra; Monell, supra. It is this hallmark distinction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith:

Owen v. City of Independence,
445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d
673 (1980)

(citing to Syllabus prepared by Reporter
of Decisions, for ready reference by this
Honorable Court)

* * *

. . .The District Court, after a
bench trial, entered judgment
for respondents. The Court of
Appeals ultimately affirmed
holding that although the city
had violated petitioner's rights
under the Fourteenth Amendment,
nevertheless all the
respondents, including the city,
were entitled to qualified
immunity from liability based on
the good faith of the city
officials involved.

Held: A municipality has
no immunity from liability under
{ 1983 flowing from its
constitutional violations and
may not assert the good faith of
its officers as a defense to
such liability.

* * *

(d) Rejection of a
construction of { 1983 that
would accord municipalities a
qualified immunity for their
good-faith constitutional
violations is compelled both by
the purpose of { 1983 to provide



protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials--the injustice particularly in the absence of bad faith of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively--are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.

(Emphasis supplied)

It is thus, crystal clear that the state of mind of the policy-makers is irrelevant in determining municipal liability.

6. It is respectfully submitted that the transmogrification by this Court

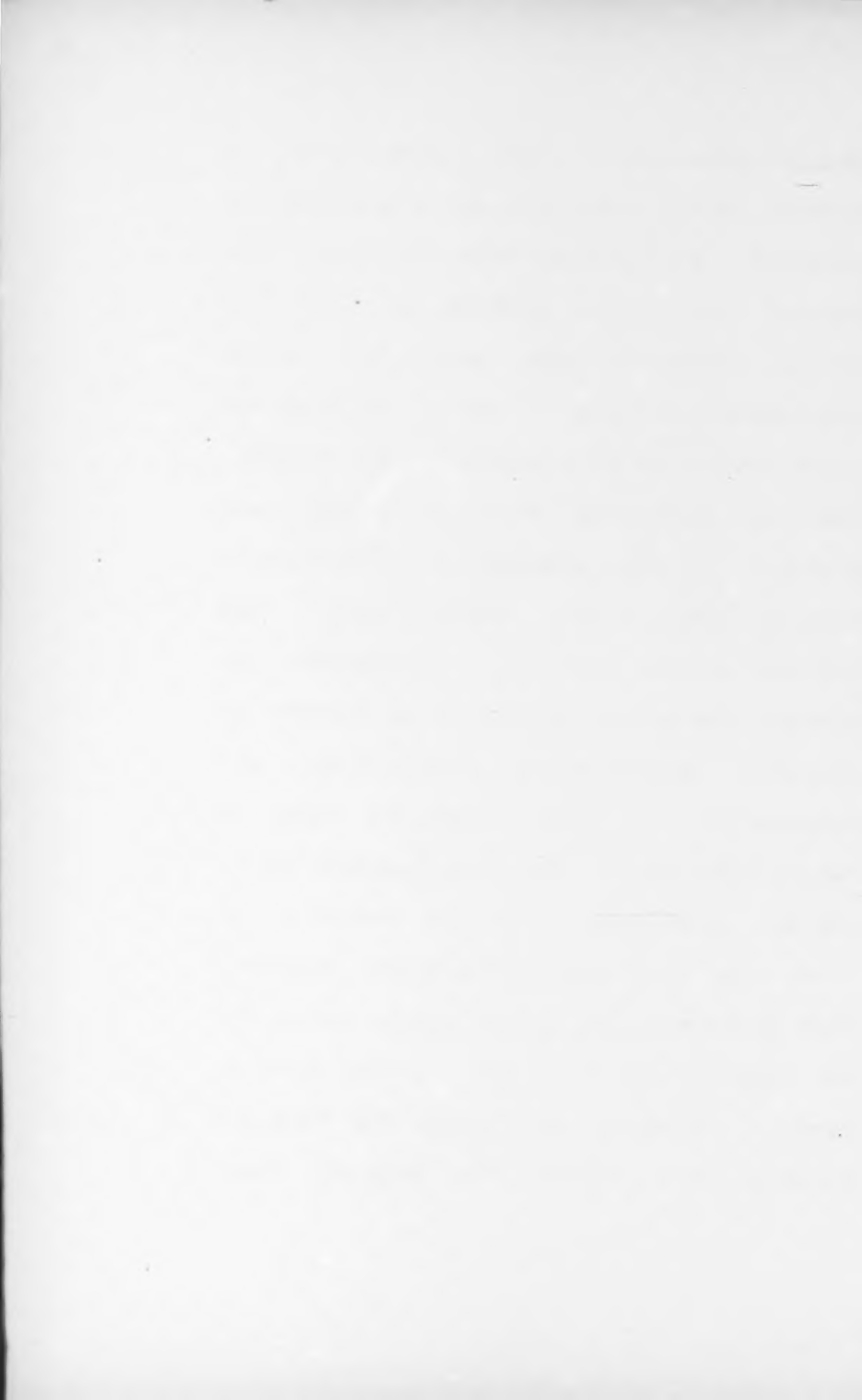


of Section 1983 individual liability principles and nomenclature (negligence, lack of due care, gross negligence, reckless disregard, intent, willfulness, etc.) to a Section 1983 municipal policy/liability setting is at odds, not only with prior Supreme Court decisions left in tact by Daniels v. Williams, supra,^{1/} (See e.g., Hudson v. Palmer, 468 U.S. _____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983); Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1981)), but also with last week's decision in Pembaur v. City of Cincinnati, _____ U.S. _____, 54 L.W. 4290 (March 25, 1986).

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a



County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing, this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policy-makers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court



would have been obliged to dismiss plaintiff's action because it is clear that the policy-maker, by making policy in accordance with the law of forcible entry as it then existed, did not act negligently, recklessly or willfully.

It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policy-maker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability.

7. The use of deadly force herein violates the clear holding of City of Memphis Police Department v. Garner, 471 U.S. _____, 105 S.Ct. _____, 85 L.Ed.2d (1985) and the Fourth Amendment. (Please see Answer Brief of Appellee pp. 40-45).

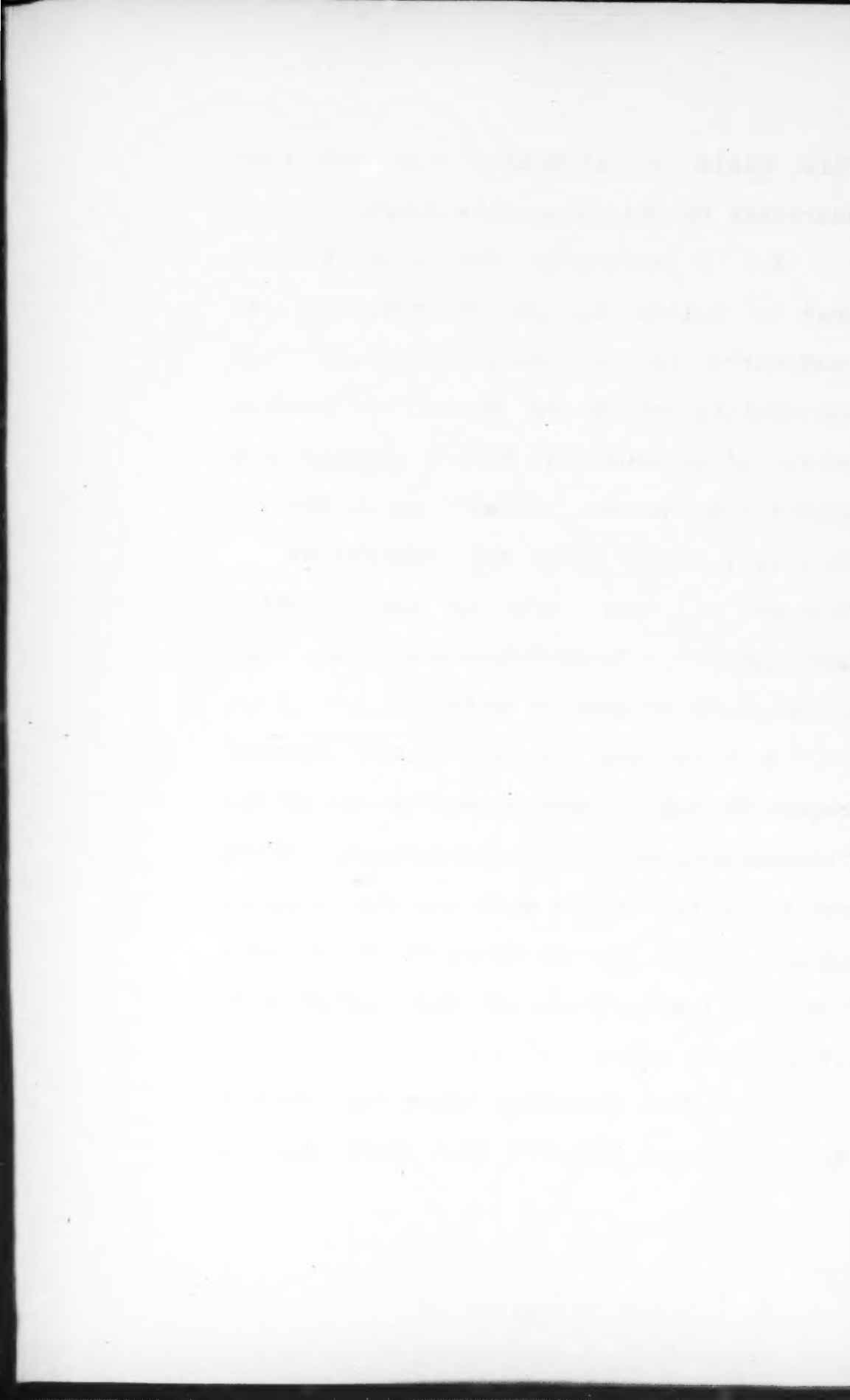


This basis of liability has not been addressed by this Honorable Court.

8. A finding by the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure policy of governmental bodies (Please see Appellee's Answer Brief pp. 40-45). Moreover, these terms are neutral as to degrees of care and do not connote "negligence", "reasonableness" or any other state of mind or conduct.

9. In any event, with further regard to the alleged erroneous use of the "Adequate/inadequate" nomenclature, there can be no reversible error as the parties agreed to the use of these terms in both the jury instructions and the verdict form (T 835-839; 894).

10. This Honorable Court has stated in its current Opinion that there was no



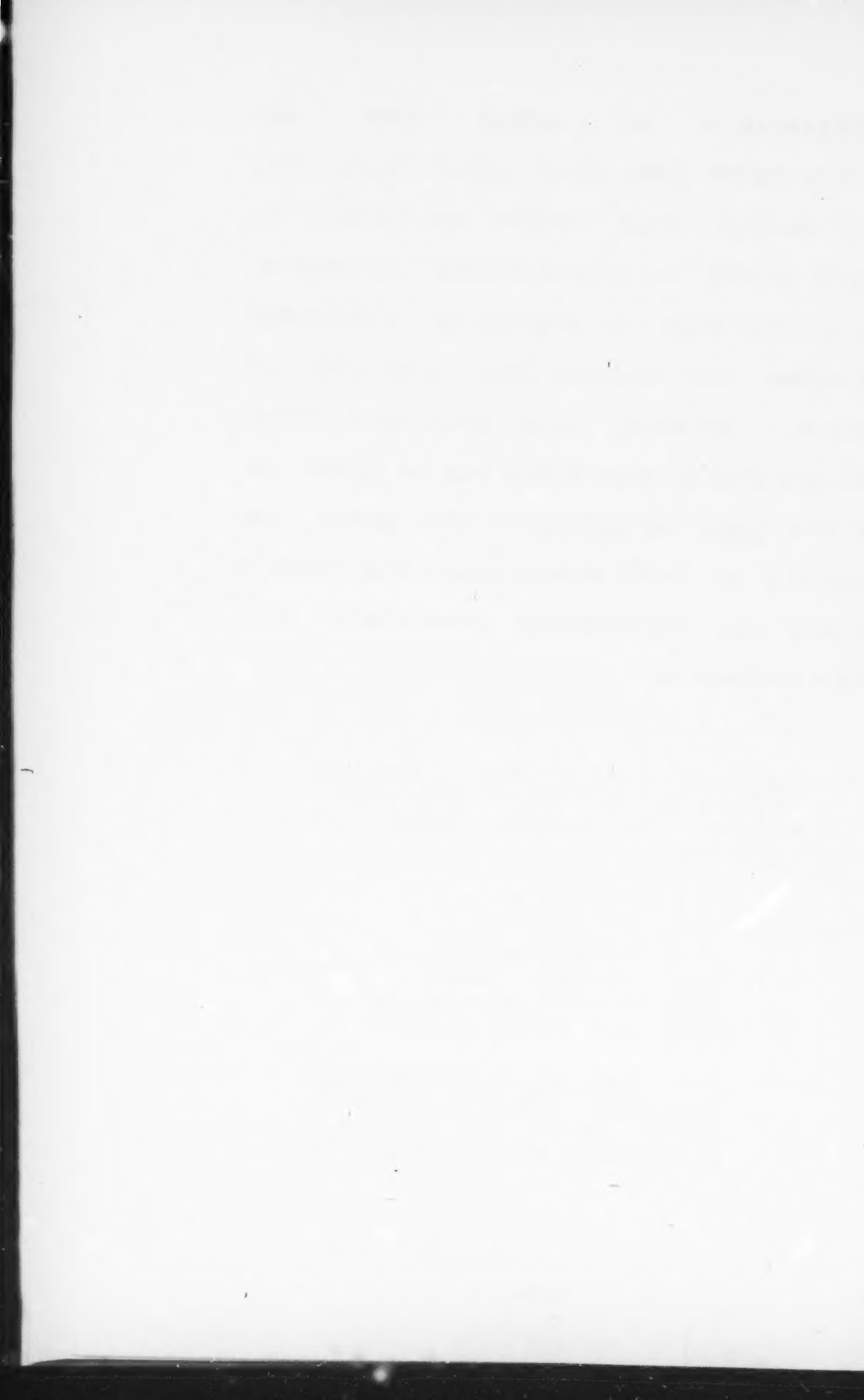
consideration or proof that the policy-maker (the City) acted more than negligently, with either an intent to cause injury, or with reckless disregard. We believe such an inquiry is irrelevant in order for Section 1983 liability to attach. Moreover, this Honorable Court has not stated that there was no proof as to the type of policy. The proof was directly to the effect that the City's policy was "incredibly reckless", and "unconscionable":

Testimony of Dr. Kirkham
(appearing at pp. A-122-123,
Appendix to Answer Brief of
Appellee)

* * *

Q. Could you tell us, if you would, what your professional opinion is of that particular policy?

A. That it is incredibly reckless. That it flies in the face of basic principals regarding police



pursuit. That I, as an expert, have never seen such a policy in this country. That it places the goals of apprehending a suspect over the safety of innocent people, and I think that is unconscionable.
(Emphasis supplied)

11. This Honorable Court's treatment of the damage question is hard to understand as the parties agreed to use the same measure of damages for both causes of actions and that measure of damages was that of the Florida Standard Jury Instructions for wrongful death. (A-266-271, Appendix to Appellee's Answer Brief). There was no additional element of damage instructed because of the presence of a Section 1983 count. Thus, the jury has already determined the damages under the common law negligence count for wrongful death.

12. It is respectfully submitted that by blending the Supreme Court's clear

lines of demarcation between measuring or scrutinizing municipal policy, as opposed to state employees' individual conduct, this Court is making new and highly destructive inroads into Section 1983. We believe this Court would not want to do so. We do not believe that the Supreme Court ever intended that more be necessary for municipal liability to attach than what was pointed out by this Honorable Court in its original Opinion.

THIS HONORABLE COURT'S ORIGINAL OPINION
FILED December 17, 1985

* * *

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death, express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk

of injury or death for innocent members of the public or the officer. 5/ The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985).

* * *

Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and safety of innocent persons would meet with the approval of, and indeed was required by, the City policymakers. As such,



municipal liability under
Section 1983 was adequately
shown.

(Emphasis supplied)

(At pp. 4-5)

13. Consequently, in light of the particular time frame involved herein where the United States Supreme Court decided two important Section 1983 cases long after plaintiff had its final opportunity to comment upon or discuss these cases, one which is said to be dispositive on Plaintiff's claim itself, it is respectfully requested that this Honorable Court grant Appelle's Motion in the interests of fairness and justice. This matter can then be set down for limited argument and submission of briefs on the narrow issues delineated herein. In this way, both sides would have a full and fair opportunity to participate in having this Court reach a fully informed decision.



II. APPELLEE'S ALTERNATIVE MOTION TO STAY
ISSUANCE OF MANDATE AND FOR EXTENSION
OF TIME TO FILE REHEARING MOTIONS.

14. Should this Honorable Court fail to grant the relief requested above (Part I), then Appellee still wishes to protect its rights to file a Motion for a Rehearing pursuant to Rule 9.330 and Rehearing En Banc, pursuant to Rule 9.331 or alternatively, for Certification to the Florida Supreme Court. These motions will require detailed consideration, research and analysis, and counsel for Appellee is scheduled to start a major trial on April 7, 1986 in the 11th Judicial Circuit Court, in and for Dade County, Florida (Green v. Ed Ricke & Sons, Inc., et. al., Case No. 80-8169 (CA-21)).

15. Moreover, unless an extension of time is granted, the initial fifteen (15) day period may expire, or nearly expire



before Part I of this Motion is decided. Hence, Appellee respectfully requests this Honorable Court to stay issuance of the mandate and extend the time for Appellee to file its Motions for Rehearing and Rehearing En Banc and alternatively, For Certification to the Florida Supreme Court until fifteen (15) days from the decision regarding Part I of this Motion.

WHEREFORE, Appellee respectfully requests that this Honorable Court consider Appellee's Motion, and in the interests of justice, grant Part I thereof, and alternatively, grant the relief requested in Part II of this Motion, and grant such other, further and different relief as this Court may deem just and proper.

Dated at Miami, Dade County, Florida,
this 5th day of April 1986.



ABRAMSON & MAGIDSON, P.A.
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799 Brickell Plaza
Miami, Florida 33131 and

FELDMAN & LEVY, P.A.
Attorneys for Appellee
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130

By: /s/
Donald Feldman



CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appellee's Motion to Vacate Order on Rehearing, or Alternatively, Motion to Stay Issuance of Mandate and for Extension of Time to File Rehearing Motions was this 5th day of April 1986, mailed to the following:

Lucia A. Dougherty, City Attorney
Gisela Cardonne, Asst. City Attorney
City of Miami Law Department
169 E. Flagler Street, #1101
Miami, Florida 33131;

Thomas M. Pflaum, Esq.
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FELDMAN & LEVY, P.A.
Attorneys for Appellee
Suite 1700 Courthouse Tower
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Miami, Florida 33130
Telephone No. (305)374-0007

By: /s/
Donald Feldman

FOOTNOTES

- 1/ Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) was solely and exclusively concerned with individual, random, and unauthorized acts of prison officials. The distinction between these types of acts and those acts pursuant to established procedure is clearly drawn and then followed in Hudson v. Palmer, supra and Logan v. Zimmerman Brush Company, supra. The standard for individual, random, and unauthorized acts is said by the Parratt court to be negligence. It is only this aspect of Parratt that has been overruled by Daniels. The other aspects of Parratt are untouched by Daniels. The degree of care for individual, random and unauthorized acts has never been a feature or an issue in the Section 1983 claim herein.

IN THE DISTRICT COURT
OF APPEAL

THIRD DISTRICT OF
FLORIDA

CASE NOS. 84-1679
84-2525
85-1352

THE CITY OF MIAMI,

Appellant,

vs.

GENEVA HARRIS, as Personal
Representative of the
Estate of Doretha a/k/a
Dorothea Rolle, Deceased,

Appellee.

MOTION FOR REHEARING OR FOR REHEARING
EN BANC, OR ALTERNATIVELY, FOR
CERTIFICATION TO THE FLORIDA SUPREME COURT

This Court has made a serious error in a significant opinion and so, pursuant to Rules 9.030, 9.330 and 9.331, Fla. R. App. P., the Appellee, GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,



urges this Court to grant a rehearing or rehearing en banc, or alternatively to certify its opinion to the Florida Supreme Court. It is respectfully submitted that this Honorable Court has failed to consider and take into account that which follows.

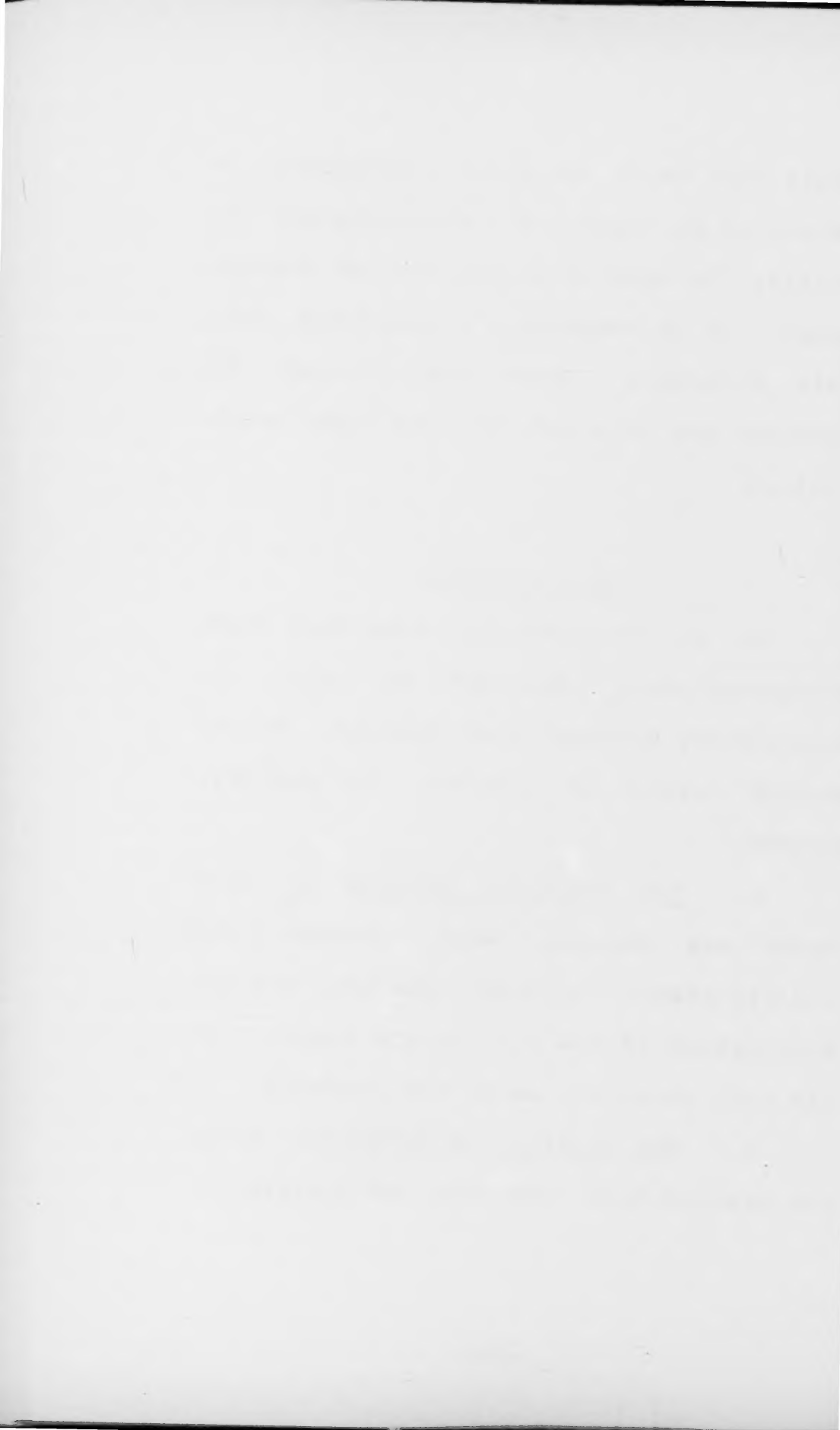
I

IN A NUTSHELL

It is respectfully submitted that stripping this document of all the explanatory material that follows, relief should herein be granted, in summary, because:

1. THE ORIGINAL OPINION in this cause was concise, well reasoned and clearly stated the facts, the law, and the application of the one to the other. It was well received, as it was correct;

2. THE OPINION ON REHEARING takes for granted that the case of Daniels v.



Williams, 474 U.S.____, 106 S.Ct.____, 88 L.Ed.2d 662 (1986) applies herein. This Court's opinion lacks any ratio decidendi. Although Daniels was decided after oral argument herein and after the original opinion of this Honorable Court, this Honorable Court, without giving your Appellee, GENEVA HARRIS, etc., any opportunity to comment on Daniels, has adopted same as controlling herein. We respectfully submit that this Honorable Court is in error for so doing because:

A. Daniels is clearly inapposite as it deals solely with individual liability and not governmental liability for its policy;

B. As adopted herein, Daniels would conflict with and would be clearly contrary to the teachings of Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); Monell v.

Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Hudson v. Palmer, 468 U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983); and Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The Supreme Court never intended the application of Daniels herein. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) was solely and exclusively concerned with individual, random, and unauthorized acts of prison officials. The distinction between these types of acts and those acts pursuant to established procedure is clearly drawn and then followed in Hudson v. Palmer, supra, and Logan v. Zimmerman Brush Company, supra. The standard for individual, random, and unauthorized acts is said by the Parratt court to be negligence. It is only this aspect of Parratt that has been

overruled by Daniels. The other aspects of Parratt are untouched by Daniels. The degree of care for individual, random and unauthorized acts has never been a feature or an issue in the Section 1983 claim herein;

C. The most recent United States Supreme Court decision, Pembaur v. City of Cincinnati, ____ U.S. ____, 54 L.W. 4290 (March 25, 1986) illustrates the error of this Honorable Court's approach herein;

D. This Honorable Court's most recent decision, Mazzilli v. Story, 11 F.L.W. 732 (April 4, 1986) is probably not in harmony with the Court's analysis in the opinion herein.

3. If the jury was charged wrongly, and if the verdict form was improper, there can be no reversible error as they



were both mutually agreed upon and/or unobjected to; and

4. There is no need for a new trial on damages in the State Wrongful Death Action as the jury was asked to determine the total amount of damages suffered as a result of the death of Doretha Rolle. The instructions were the Florida Standard Jury Instructions for Wrongful Death. There was no added element of damage, although there should have been, because of the Section 1983 cause of action. Therefore, the jury has already determined the damages under the Florida Cause of Action for Wrongful Death; there was not any duplication of damages.

II

THE BASIC FACTS

1. Doretha Rolle was seated on a bus bench in Liberty City on Northwest 17th Avenue and Northwest 58th Street. It

was Sunday evening, April 27, 1980. Approximately twenty to twenty-five minutes before, one Tyrone Grant Rolle, of no relation to Doretha, had just committed a burglary of some shirts and cigarettes at a J.C. Penny Store at Northeast 79th Street and Biscayne Boulevard (T 149).

A high speed police chase involving every police vehicle in the Northern sector of the City ensued with gun shots being fired at the pursuee (T 224). Lastly, the police rammed the robber's vehicle, locked fenders, and forced him off the road into and over Doretha Rolle (A 227-229). Mrs. Rolle sustained fatal injuries.

Doretha Rolle lived in the Ghetto with her three children. She was 32 years of age and worked as a cook at the Dorsey Skills Center in order to support her three children. Glendora was



17, Aaron 12 and Derrick 13 years of age at the time of her accident (T 523 and T 524). Mrs. Geneva Harris, 50 years old, Doretha's mother, was dependent in part upon her for support because of an inability to engage in full time employment due to physical infirmities. Rolle was dragged underneath the offender's vehicle for approximately a block and during such time, she suffered severe painful, and eventually death producing burns.

Before she died, however, Doretha Rolle was hospitalized at the University of Miami Burn Center, Jackson Memorial Hospital, and she lingered through nineteen horrendous days before she expired (T 469). During that course of time, she had to undergo a partial mastectomy and a complete mastectomy. "Her breasts were burned so badly that we

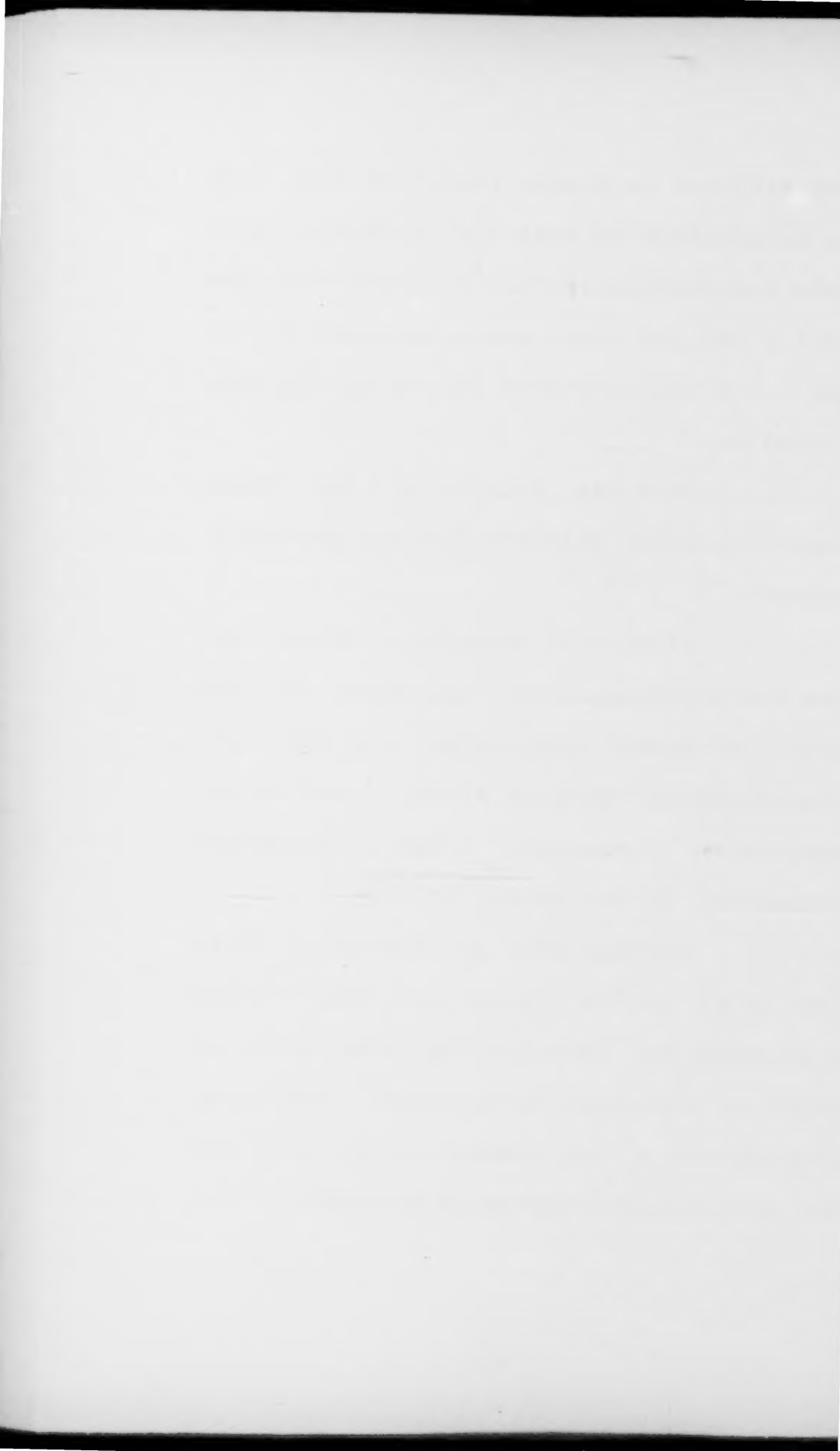


actually had to remove them." (T 473). It is unnecessary to describe in detail what this hospitalization was like and what the family saw and what their reaction to it was. It was anything but a de minimis situation.

2. Suit was brought by her three dependent minor children and her dependent mother.

After jury selection, which had the Plaintiff/Appellee objecting to the CITY OF MIAMI exercising all of its challenges to exclude Blacks, and after opening statements, the testimony commenced. (T 59, 80-86, 527-530).

Officer Crowley testified with the aid of a tape of the radio transmissions recorded by the CITY OF MIAMI on the night in question. The tape, significantly, had breaks in it, and ran for only twelve minutes (T 228-230). The



chase actually encompassed twenty-one minutes (T 200).

An alleged incident of the felon being surrounded at Northwest 17th Avenue and 75th Street was not on the tape, nor was there any indication of police gun fire on the tape (T 236). It is undisputed that the police fired shots at the fleeing car (T 224) (A-5).

It was the CITY OF MIAMI's trial strategy, however, not to question any of its witnesses about the discharge of firearms.

3. The undisputed facts of the chase are that it was high speed (up to 70 m.p.h.) (T 155). The felon's vehicle did not have its lights on (T 150), went through red lights and stop signs, and just missed hitting vehicles (T 155). An attempt was made to block the road with a police vehicle which only caused



accelerated speed and driving on the sidewalk (T 664-666).

The vehicle ran through the front yard of a house, and ran into a police vehicle or it was thought he was going to ram somebody (T 173). There was no supervision of the chase and supervision would have helped (T 177, 199, 200, and 219). Coordination was virtually nonexistent (T 174), even though every unit of the Northern half of the City of Miami Police Department was involved in the chase (T 554).

The police cars were playing "DODGEM".

Officer Crowley testified that the area toward the end of the chase was congested with police and other vehicles (T 168).

Colonel Witt testified that the area was congested with people.



Testimony of Colonel Witt (City
of Miami Trial Representative)

* * *

Q. Okay.

You recall the portion of the tape where there is a dispatch from Officer Crowley?

Excuse me. There is a communication from Officer Crowley where he says, look out. It is getting congested, and then the dispatcher relays back, again, all units, look out.

* * *

Q. What was the first vision that came into your mind?

A. There is--especially at that time, I think--subsequently, in fact, I know it has subsequently closed, just east of that intersection, there is a Dairy Queen ice cream store that was very, very popular on a warm spring evening.

This was a (sic) 8:30 at night or so on a Sunday. We undoubtedly have * people there. Just south of 71st Street, there is an--it is again no longer there--there was a very popular night spot.

My experience in nine years in that neighborhood is that that tended to create a good bit of

congestion at that intersection,
particularly on a Sunday evening.

Q. Thank you very much,
Colonel.

Just one moment. I'm sorry.

MR. FELDMAN: We have no
further questions.

Thank you.
(A-96 and A-97) (Emphasis
supplied)

4. The pursuee was of the firm
conviction that he was deliberately hit,
forced off the road, and knocked into the
bus bench. This testimony was not
referred to in Appellant's Initial Brief.

Testimony of Tyronne Grant Rolle

* * *

Q You're moving your hand.

How did the police car hit
you? Did he turn into you? Did
you turn into him? Just what
happened?

A He ran into me. I had
plenty of chances to run into
them, if I wanted to run into
them.



Q So, the police officer ran into you and what happened at that point?

A He knocked me up on the sidewalk.

Q What happened then?

A I hit a bus bench.

Q Is that the bus bench we are talking about?

A Right.

Q What happened after you hit the bus bench?

A I lost control of the car.
(A 228-229) (Emphasis supplied)

Plaintiff's trial counsel

characterized the event thusly:

Plaintiff's Closing Argument

* * *

It is an insult to everybody's intelligence. There is a direct, direct relationship. There is a police car directly on this particular vehicle. There is a police car which collided with this vehicle.



Why did he leave the road right there. He bumped him once. Then they lock and come together. They separate and he hits the bus bench.

Nonsense. This man was an incredibly good driver. Incredibly good, if you believe that there was a rear tire out, that he was riding along and sparks were flying all over the place.

That they lost him with all these sparks at night. They didn't know where he was. This man was great as a driver. The most incredibly great driver.

He wasn't just leaving the roadway because he decided he wanted to go through bus benches and lights. No. He went there because he was put there.

(T 935-936) (Emphasis supplied)

5. The offender made it crystal clear that he was not anxious to have continued in the chase, but did so solely because of his fear of police reprisal (A 221-222).

It is undisputed that Rolle was unarmed, feared for his life at the hands

of the police and would have liked only the opportunity, to terminate the chase and run on foot if allowed (A 254-255).

His fears were not misplaced.

Trial Proceedings

* * *

MR. FELDMAN: We have a very sensitive issue as far as I am concerned. Your Honor will note that counsel for the City of Miami at the deposition of Tyronne Rolle in support of her issue of all of his past convictions, arrests, his total conduct, as justification for using that, she wanted to show that he never complained about things in the past. That he claimed force was used upon him, but he never filed any complaints that went to that, and also, that he was not really in fear for his life from the police, their actions, et cetera.

At the conclusion of this incident, the gentleman who was sitting on the bus bench with Mrs. Rolle, who was thrown up by the police car, and never brought a claim for anything, did, however, file a claim with the

City of Miami for police brutality and police misconduct.

THE COURT: As to him?

MR. FELDMAN: As to him personally. They thought he was this gentleman here, who said he was in fear for his life. That complaint was that he was put onto the ground, and a gun put to his head and a knee put in his neck, and told, not to run, nigger. Don't you get away, nigger. They abused him on the ground.

The City of Miami based upon the officer saying that that didn't happen, and his willingness to take a polygraph, and the officers not--you know, they dismissed the complaint and they found it was without any basis, and I think that that goes to the issue as to what happens when you file complaints, whether or not he had a justifiable fear at the time for his life.

(T 458-459)

6. The City of Miami had a policy with regard to police chases. There were definitive rules and regulations. In sum, these rules and regulations dictated and mandated that the chase continue even if it took ten days.

City of Dallas, Texas
February 10, 1910

The Hon. J. C. Smith

My dear Sir:
I have the honor to acknowledge the receipt of your letter of the 7th inst. in relation to the matter of the proposed extension of the Texas Electric Light and Power Company's lines to the city of Dallas. I am sorry to hear that the company has been unable to secure the necessary franchise for the extension of its lines. It is the policy of the city to encourage the development of electric light and power, and it is the hope that the company will be able to secure the franchise in the near future.

I am, Sir, very respectfully,
Yours very truly,
J. C. Smith
City of Dallas, Texas

Very truly yours,
J. C. Smith

Enclosed for the City of Dallas are two copies of the report of the committee on the proposed extension of the Texas Electric Light and Power Company's lines to the city of Dallas. The report is dated January 10, 1910, and is in accordance with the resolution of the city council of the 10th inst. The report is in accordance with the resolution of the city council of the 10th inst. The report is in accordance with the resolution of the city council of the 10th inst.

Deposition of Party Defendant, CITY OF

MIAMI

* * *

A. Okay. Pertaining to Item F of the interrogatories, my response being S.O.P. 3.57.3 was quoted here, and I am quoting and referring to 3.57.3 of the rules and regulations manual which I have read before and read as follows.

'Force. The failure on the part of any member to take action with respect to violation of such statutes, laws, ordinances and regulations coming to their attention or about which they have knowledge shall be made the subject of disciplinary action against such member.'

I personally know that is one item that would cause and bind a police officer to pursue a vehicle, a fleeing felon, and that would be an adequate response to item F.

Q. Sir, let me ask you this, if I can. Does this particular 3.57.3--is that meant as your interpretation of it, that it requires that a police officer or police officers should pursue a fleeing felon until forever, or is there some point where they

can stop or do they have to go on forever, if that is necessary?

A. At the time that this incident took place, that this manual was in effect, there was no provision for a police officer to discontinue pursuit of a fleeing felon and cut off. The only criteria that I personally remember from experience in having read these manuals, is that you do so in a safe manner without ever putting yourself in a position of not having control of your vehicle, that you do not exceed, as we read out the general orders over 20 miles an hour over the speed limit. Other than that, yes, sir.

The answer to your question is, you pursue for ten days. As long as it is hot pursuit, and you don't lose sight of the vehicle, and you are in constant contact with the person that you are trying to apprehend.

(A 170-172) (Emphasis supplied)

If a police officer did not continue to chase a fleeing felon, he would be subject to charges of cowardice, neglect of duty, and negligence.

can be used in many ways to the
benefit of the community.

It is the duty of every citizen
to contribute to the welfare of the
community. This can be done in many
ways. One way is by paying taxes
on time. Another way is by
obeying the laws. A third way
is by being a good neighbor.
If everyone does their part, the
community will be a better place
to live in. We can all make a
difference.

The government has a duty to
protect the rights of its citizens.
It must also provide for the
welfare of the community. This
can be done in many ways. One
way is by providing education.
Another way is by providing
health care. A third way is
by providing social services.

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to protect the rights of its citizens.
It must also provide for the
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way is by providing education.
Another way is by providing
health care. A third way is
by providing social services.

90

Deposition of Party Defendant, CITY

OF MIAMI

* * *

A. All right. Now, in looking at the rules and regulations manual, I found other things that as a police officer guided me. They had to do with things that are expected of a police officer. There are different areas in that particular rules and regulations manual and I have them here, and you can read them, that deal with or have to do with the responsibility of members, and other areas. Negligence. Inattention to duty. Other things that would cause a police officer to be held accountable for not pursuing a felon, that could very easily be conceived to be neglect of duty, cowardice, and other things that I believe bind a police officer to pursue a felon.

(A 167) (Emphasis supplied)

7. Dr. Paul Kirkham testified as an expert witness for the Plaintiff/Appellee. He had also been contacted by the City of Miami to testify on its behalf (A 114). He is extremely well credentialed as a criminologist, (A 111-114) and his area of

specialty is police standards and procedures in the United States (A 110).

Dr. Kirkham testified that there are national standards for discontinuing police pursuit that are published by the International Chiefs of Police (A 119-120).

The witness clearly compared acceptable standard police policy to that articulated by the City of Miami and found the latter's policy to be "incredibly reckless", and "unconscionable".

Testimony of Dr. Kirkham

* * *

Q. All right. Going to the City of Miami policy with regard to discontinuing a pursuit, when there is danger, we have heard testimony in this courtroom, and I believe that you have seen it, regarding the actual policy of the City of Miami, to-wit, that the officer has an obligation to continue his pursuit unless, what, he loses sight of the fleeing vehicle, or, two, that the officer's vehicle becomes

disabled. Are you aware of that policy?

A. I am.

Q. Could you tell us, if you would, what your professional opinion is of that particular policy?

A. That it is incredibly reckless. That it flies in the face of basic principals regarding police pursuit. That I, as an expert, have never seen such a policy in this country. That it places the goals of apprehending a suspect over the safety of innocent people, and I think that is unconscionable.
(A 122-123) (Emphasis supplied)

The key difference "simply stated" between the City of Miami's policy and an adequate policy was that the latter policy would provide specifically for discontinuance of the chase when significant risk to innocent persons became evident.

The policy, advocated by Dr. Paul Kirkham, from the International Chiefs of Police reads as follows:

Classified and Controlled Document
100-100000

Page 1

1. The following information is being furnished to you for your information only. It is not to be used for any other purpose.

2. This information is being furnished to you for your information only. It is not to be used for any other purpose.

3. This information is being furnished to you for your information only. It is not to be used for any other purpose.

4. This information is being furnished to you for your information only. It is not to be used for any other purpose.

International Chiefs of Police

Responsibility for the decision to employ emergency vehicle operations in a "fresh pursuit" rests with each officer. In arriving at his decision, the officer must carefully consider all factors involved, including the seriousness of the offense and the possible consequences of his actions. Most importantly, the safety of citizens is the officer's paramount consideration.
(A 295) (Emphasis supplied)

* * *

ABANDONING PURSUIT: The pursuing officer must at all times use his best judgment in evaluating and reevaluating the chase and make a continuous appraisal of it in deciding whether he should continue the pursuit. The element of personal challenge should never enter into the officer's decision. The decision to abandon pursuit is, under certain circumstances, the most proper course of action. Officers should discontinue any chase when: The hazards of exposing the officer and the public to unnecessary dangers are high.

(A 297) (Emphasis supplied)

The City of Miami's policy not only did not comport with that policy, but it was in direct contravention and contradiction thereof (A 194).



The City of Miami's policy was also in contravention of the then existing policy of Metropolitan Dade County. That policy was allowed in evidence over objection because although the exact numbers of police officers might be different, the fact that they are police departments in major Metropolitan areas is more determinative (A 133-134).

The relevant policy of Metropolitan Dade County was almost a carbon copy of that articulated by the International Chiefs of Police (A 303).

The jury, pursuant to agreed instructions and an agreed form of verdict, found that the CITY was negligent by and through its officers in the Florida Wrongful Death Action. It further found that the CITY had an inadequate policy that was the legal cause of the death of Doretha Rolle on the Section 1983 Count.



II

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OR

WHY BOTHER

A. AFTER THIS HONORABLE COURT'S OPINION OF DECEMBER 17, 1985:

1. December 31, 1985 (Amended January 7, 1986): THE CITY OF MIAMI filed a Motion for Rehearing or for Rehearing En Banc, or Alternatively, for Certification to the Florida Supreme Court.

This document was filed by totally new counsel and it was as if the entire appellate procedure was first beginning (or being rewritten).

It was thought that this document was abusive, irreverent, and fallacious, at least in patent disregard of the Florida Appellate Rules;



2. January 7, 1986: GENEVA HARRIS filed her "Response to and Motion to Strike, etc."

To the best of our knowledge, this Honorable Court has not addressed this document;

3. January 13, 1986: CITY OF MIAMI filed its Reply to Appellee's Motion to Strike.

This document just reenforced the prior infirmities of the Motion for Rehearing, etc. and was even more blatantly in violation of the Florida Appellate Rules:

4. January 29, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority which listed cases, the latest of which was decided at least five (5) years prior to oral argument of this cause;



5. February 3, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority (Daniels v. Williams and Davidson v. Cannon).

As the cases were decided January 26, 1986, it could not be argued that this was improper;

6. February 27, 1986: The CITY OF MIAMI filed its Supplemental Memorandum giving its formal "PRESUMPTUOUS" opinions on Daniels and Davidson. This, once again, in clear violation of the Florida Appellate Rules; and

7. April 1, 1986: This Honorable Court entered its Order on Rehearing.

B. AT PRESENT:

1. GENEVA HARRIS is now in the position of having, not to help direct an opinion (which is her right) but of trying to undo what has already been written for all to see. To convince this Court that



which has now been twice done is wrong, rather than to argue what is once done is right, is an unfair, but a present burden, which we most strongly object to.

2. Frankly, there is a very strong temptation to just let be, what is. But, the consequences of leaving this opinion as it is, are perceived to be so great - a very real and unwarranted death in this District and for these Plaintiffs of Section 1983 - that not even the "lawsuit crisis" or the "insurance crisis" or other ill conceived rhetoric will let us take an easy way out.

We are convinced, therefore, that what is to be seen, will be seen; what is to be reasoned, will be reasoned; and what need be perceived, will be discerned. To this end we proceed.



III

THE LAW - GENERALLY

A. WHAT IS NOT INVOLVED.

It is respectfully submitted that this Section 1983 claim is not:

1. an action based on Respondeat Superior;

2. an action which deals with random, unauthorized acts;

3. an action which is predicated on inadequate training; or

4. an action which seeks to impose individual liability.

B. WHAT IS INVOLVED.

It is your Plaintiff/Appellee's argument that there was a very definite policy of the City of Miami that caused the deprivation of the life and liberty of Doretha Rolle and the deprivation of her children and her mother's liberty and



property. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

This policy was invalid and inadequate in that:

1. it prescribed the use of deadly force when same was impermissible to effectuate an arrest herein; and

2. it mandated that the chase continue or did not clearly allow for the discontinuation of the chase herein.

This Honorable Court itself clearly focused in on the issue in rather unmistakable terms.

Original Opinion - dated December 17, 1985:

* * *

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment

of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the public or the officer.^{5/} The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

(At pg. 4) (Emphasis supplied)

C. THE CONTEXT AND ORIGINS OF DANIELS V. WILLIAMS AND WHAT IT DID, IN FACT, OVERRULE.

Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56

It is a very common mistake to suppose that the
theology of the Middle Ages is a mere repetition of
the ideas of the Fathers. In fact, it is a new
theology, based on the ideas of the Fathers, but
developed in a new way. The Middle Ages saw the
growth of the Scholastic method, which was a
new way of thinking about God and the world.
The Scholastics were not content with the simple
statements of the Fathers. They wanted to know
the reasons for the things that they believed.
They wanted to know the logic of the faith.
They wanted to know the philosophy of the faith.
They wanted to know the science of the faith.

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L.Ed.2d 611, 638 (1978). The Monell principle, aptly relied upon by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.

The origin of Daniels is the Supreme Court Decision in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Notably, that case does not, nor does it (sic) progeny, Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) or Hudson v. Palmer, 468 U.S.____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983), deal with municipal liability. It is, however, possible to extrapolate some very valuable principles from them.

1. There is a substantial difference in the Constitutional sense between actions which are done pursuant to

Governmental procedures and those which are not;

2. When Governmental procedures are followed, Governmental liability should then follow when those procedures are inadequate or deficient to protect the individual's Constitutional rights; and

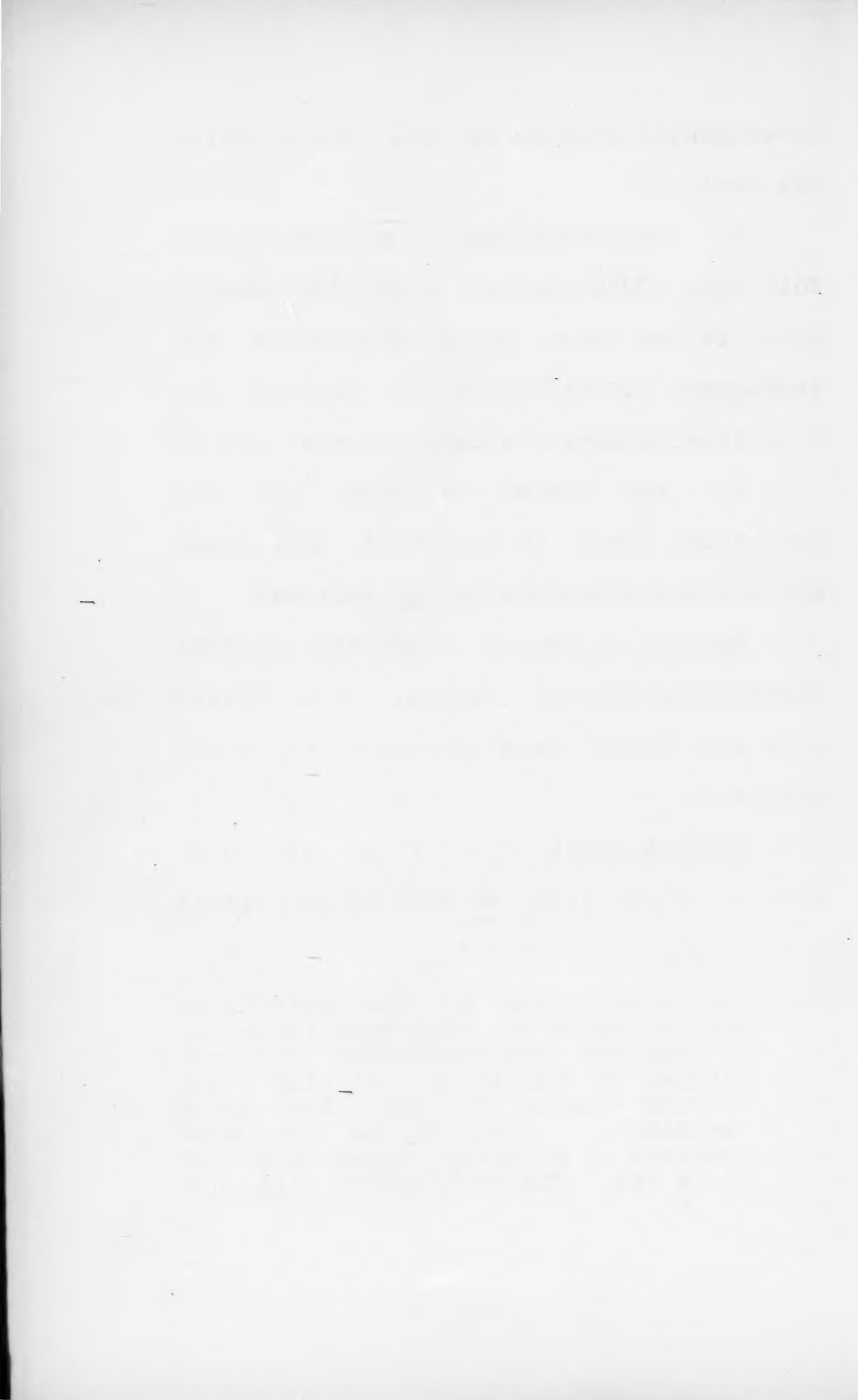
3. The state of mind of the individual actor is important only when established procedure is not followed.

Parratt v. Taylor makes the seminal distinction between random, unauthorized acts and those done pursuant to State procedure:

Parrott (sic) v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)

* * *

[1c] Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not



occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . (At 68 L.Ed.2d 433, 434) (Emphasis supplied)

In Logan, it was made clear that Parratt did not apply to deny liability where State procedure was followed:

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)

This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with "a tortious loss of ...property as a result of a random and unauthorized act by a state employee...not a result of some established state procedure." 451 US, at 651, 68 L.Ed2d 420, 101 S.Ct. 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545, 68 L.Ed 2d 420, 101 S.Ct. 1908 (second concurring opinion). Unlike the



complainant in Parratt, Logan is challenging not the commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards". (At 71 L.Ed. 2d 278) (Emphasis supplied)

Please note above how the state of mind is immaterial when it is the policy or procedure that is at issue.

In Hudson v. Palmer, 468 U.S.____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983) negligent and intentional unauthorized and random acts are put on the same footing.

Hudson v. Palmer, 468 U.S.____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983)

* * *

. . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

* * *

. . . For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy. (At 82 L.Ed.2d 393) (Emphasis supplied)

Thus, under those cases, random, unauthorized negligent or intentional acts could have been the predicate for liability. It is this and only this aspect of Parratt and Hudson that is overruled by Daniels. Now a random, unauthorized act which is negligently committed cannot be a predicate for liability, while the intentional act can still be.

4. The adequacy of state procedures to prevent harm is critical to determination of liability.

Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984)

* * *



[7,8] The "touchstone" of procedural due process is "protection of the individual against arbitrary action of government". *Wolff v. McDonnell*, 1974, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935. The goal of procedural due process analysis is to determine whether a state has provided adequate procedures to minimize efficiently the risk of arbitrary or erroneous deprivations of life, liberty, or property. (At pg. 336) (Emphasis supplied)

* * *

In this case, as in *Parratt*, "[t]here is no contention that the procedures themselves are inadequate". (At pg. 337) (Emphasis supplied)

* * *

In contrast, *Logan v. Zimmerman Brush Co.*, 1982, 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed.2d 265, involved a situation in which a property deprivation resulted from the operation of established state procedure. The Supreme Court held there that the availability of postdeprivation remedies was irrelevant to the question whether the deprivation occurred without due process of law. *Id.* at 435-36, 102 S.Ct. at 1157-56 (Majority opinion of Blackmun, J.); see also *Parratt v. Taylor*, 451 U.S. at 546, 101 S.Ct. at 1918 (Blackmun J., concurring). This holding is consistent with the *Parratt* analysis, for when a deprivation occurs as a result of the

established practice or procedure of a state agency, the result is predictable and the state has a constitutional duty to prevent it.
(At pg. 337) (Emphasis supplied)

Ramos v. Gallo, 596 F. Supp 833
(D. Mass 1984)

* * *

A Fourteenth Amendment due process claim such as the one asserted by Ramos, may be analyzed as a claim for denial of either procedural or substantive due process, or both. A procedural due process claim alleges that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. The claim focuses on the procedures used by the state in effecting the deprivation of liberty or property, which the claimant argues were inadequate in light of the significance of the interests involved. Schiller v. Strangis, 540 F.Supp. 605, 613 (D. Mass. 1982). Parratt and other cases discussed above invoke this analysis. (At pg. 837) (Emphasis supplied).

We respectfully submit that our analysis as to the effect of Daniels has recently been given judicial imprimatur in Mann v. City of Tucson Dept of Police, 782

F.2d 790 (9th Cir. 1986) - Decided after Daniels.

Mann v. City of Tucson Dept of Police, 782 F.2d 790 (9th Cir. 1986)
(Concurring Opinion of Sneed, J.)

* * *

In sum, Daniels and Davidson overruled that portion, and only that portion, of Parratt v. Taylor that held that a negligent loss of property by state officials acting under color of state law was a "deprivation" of property within the meaning of the Due Process Clause of the Fourteenth Amendment. . . .

. . . Therefore, I must be guided by this court's previously mentioned trilogy in which the rather clear message was "Apply Parratt only to random and unauthorized deprivations of property by state prison officers." See Haygood v. Younger, 769 F.2d at 1357. (At pg. 799) (Emphasis supplied)

Also instructive is King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).

King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).

* * *

. . . The Supreme Court has overruled Parratt v. Taylor's holding that negligent deprivation of property

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implicate due process interests.
Daniels v. Williams, _____ U.S. _____,
106 S.Ct. 662, 88 L.Ed.2d _____ (1986).

Here, the appellants allege that they were deprived of liberty because they were taken into custody for up to two days and because personal property was taken from their apartments. However, there has been no showing that these deprivations occurred as a result of deliberate non-random state processes. (At pg. 828) (Emphasis supplied).

The rationale of holding a State liable when action is pursuant to its procedures is that the State has the time and the resources to draw proper and adequate safeguards. It is not random conduct, but the full power of the State that is brought to bear on the individual. Liability, therefore, would in no sense be a trivializing of the Constitution.

Mann v. City of Tucson Dept of Police, supra.

* * *

I suggest that a satisfactory answer would commence with Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265



(1982). Thus, the first portion of the answer would be that the Parratt analysis is irrelevant to section 1983 claims based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice. The basis for this rule would be that the state has forfeited its opportunity under its procedures to provide an appropriate remedy for wrongs having the state's own imprimatur. (At pg. 798) (Emphasis supplied)

In sum, Parratt, Logan, Hudson and Daniels are all specifically outside of the area of municipal liability for policy. They are really not necessary, individually, or in sum, to decide this case.

Although there are valuable teachings to be gleaned from them, the discussion was also included to forestall replies to this document which may tend to obfuscate otherwise clear categories of decisions in this field.

The responses heretofore of the CITY OF MIAMI take on the flavor of a smorgasbord of doctrines, with the picking here

and there of selective morsels put together on a plate to make a meal featured by an absence of memory of what the individual components tasted like.

Apparently, we will not have an opportunity to dispel the methodology heretofore used, and presumptively will be used again, which utilizes a chameleon approach to the facts of the case, which change to suit the legal doctrines sought to be applied. This can be said and is said in regard to the inapposite citation of cases and the subtle use of legal principles designed for clearly different circumstances. Their methodology is to create a whole of which this case does not constitute a part.

In short, this line of cases, outside the area of municipal liability, also provides analysis which supports our position herein. Same, however, should



not be factually misapplied. We now turn to that which is directly relevant, factually and legally.

IV

THE LAW - THE CONTOURS OF MUNICIPAL LIABILITY

A. THIS COURT RECOGNIZES THE REAL BASIS OF MUNICIPAL POLICY LIABILITY

In its initial Opinion herein, this Honorable Court clearly and succinctly stated the basis of municipal liability for its inadequate policy.

Original Opinion - dated December 17, 1985:

* * *

Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation."⁴ Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). A finding of a policy or custom is



necessary because it shows that the violation was "neither random nor unauthorized, but wholly predictable, authorized, and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). (At pg. 3) (Emphasis supplied)

This is the rationale employed in the analysis of the disparate treatment of random, unauthorized acts on the one hand and State procedures on the other.

B. THE COURT'S OPINION ON REHEARING LOSES SIGHT OF THE TRUE BASIS OF MUNICIPAL POLICY LIABILITY BY APPLYING DANIELS TO THIS AREA OF LAW

One of the very real problems generated by this Honorable Court's Opinion on Rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policy-makers is the test to be applied or is it holding that the standard is the import of the policy itself?

We respectfully submit that this problem is not addressed by this Honorable Court and the language of the Opinion itself engenders confusion.

COURT'S OPINION ON REHEARING -
April 1, 1986

* * *

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient. (At pg. 2-3) (Emphasis supplied)

Thus, a most difficult problem is facially engendered by this Honorable Court's Opinion on Rehearing as to the difference, if any, between measuring the degree of deficiency of a policy and measuring the state of mind of the policy-makers. What is to be measured? Can a POLICY PER SE be "negligent", "grossly negligent", "reckless", "grossly indifferent", or "willful"? The English language would appear to pretermitt the latter, though the import of a policy is, of course, not precluded.

We respectfully submit that neither standard is correct for determining a city's liability for its policy. The real underlying problem with this Honorable Court's current Opinion is that a new United States Supreme Court Opinion (Daniels) on an individual's liability or liability for random, unauthorized acts



has been mistakenly (and without any ratio decidendi) applied to a municipality's liability for its policy.

C. THE STATE OF MIND OF POLICY-MAKERS HAS NOTHING TO DO WITH MUNICIPAL LIABILITY - IT ONLY ALLAYS FEARS OF AN INCHMEAL DEMISE OF THE CIVIL RIGHTS ACT BY FINISHING IT AT ONCE.

Referring to the excerpt from the Opinion on Rehearing cited above, it is respectfully suggested that the attempt by this Honorable Court to measure the state of mind of the policy-makers as they promulgate the policy in question was never intended by the Supreme Court because it would signal the virtual demise of the Civil Rights Act. Such state of mind could hardly ever be the subject of available proof. The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/random, individual actions, is whether or not an authorized

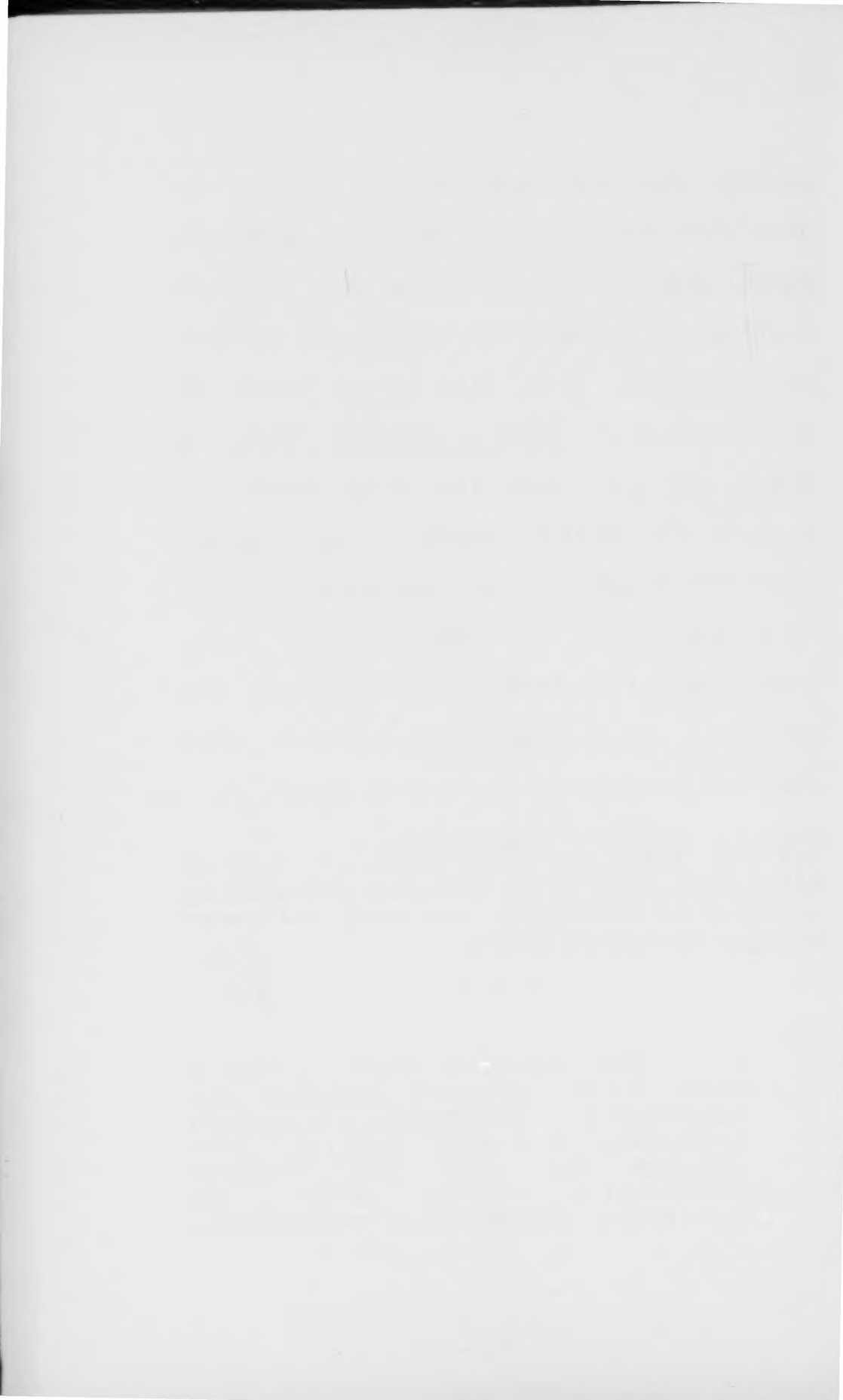


policy, when executed, results in loss of constitutional rights. See, e.g. Pembaur, supra; Monell, supra. It is this hallmark distinction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit, even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith.

Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (citing to Syllabus prepared by Reporter of Decisions, for ready reference by this Honorable Court)

* * *

. . . The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless



all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

Held: A municipality has no immunity from liability under (1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability.

* * *

(d) Rejection of a construction of (1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of (1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials--the injustice particularly in the absence of bad faith of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively--are less compelling, if not wholly

inapplicable, when the liability of the municipal entity is at issue.

The difference between suits against individuals in their personal capacity and suits against those individuals in their official capacity (governmental policy suits) is strikingly reaffirmed in Brandon v. Holt, ____ U.S. ____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); and Kentucky v. Graham, 473 U.S. ____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

D. Pembaur v. City of Cincinnati,
____ U.S. ____, 54 L.W. 4290
(March 25, 1986)

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was

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permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing, this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policy-makers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court would have been obliged to dismiss plaintiff's action because it is clear that the policy-maker, by making policy in accordance with the law of forcible entry as it then existed, did not



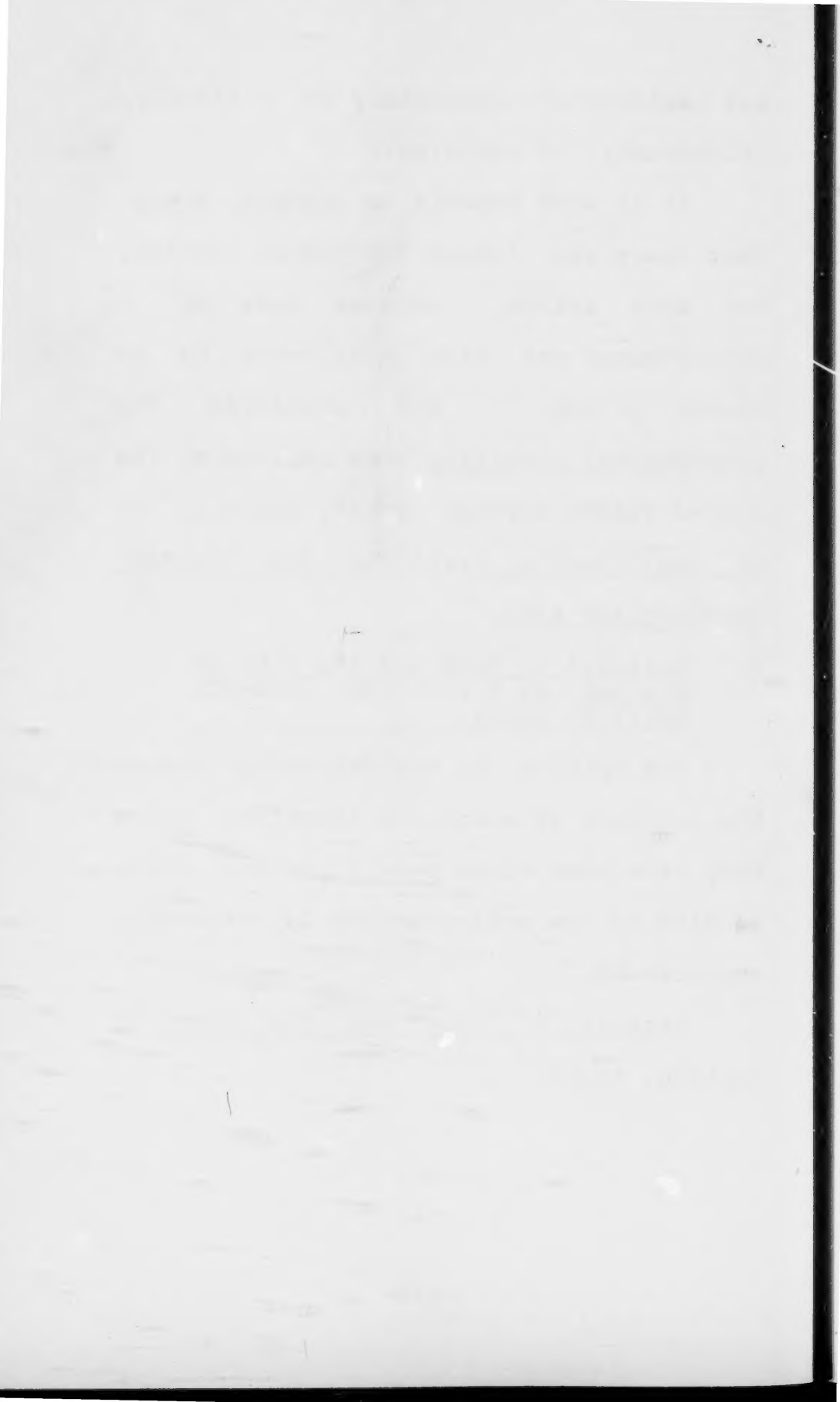
act negligently, recklessly or willfully.
(Rightously, if anything!)

It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policy-maker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability for random, unauthorized acts.

E. Mazzilli v. Doud and the City of Hialeah, 11 F.L.W. 732, (3rd DCA April 4, 1986)

The opinion of the majority leaves the contours of municipal liability where they have been since Monell and the state of mind of the policy-makers is noticeably unaddressed.

Mazzilli v. Doud and the City of Hialeah, supra.



* * *

We affirm the directed verdict for the City on the plaintiffs' claim that the City violated their civil rights. Essential to any recovery in an action brought against a municipality under Title 42, United States Code, Section 1983, is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). Neither the evidence in this record,¹/ nor the evidence which the plaintiffs assert was wrongfully excluded, shows that Doud's actions in shooting at and wounding the plaintiffs occurred as a result of such a policy or custom. (At pg. 733) (Emphasis supplied)

The concurring Opinion by Chief Judge

Schwartz treats the question of intent only insofar as individual liability is concerned.

It is respectfully submitted that Daniels v. Williams, supra, does not necessitate nor does it license a marring of the "Bright Line" which divides the



various categories of Section 1983 cases, and hence, the Daniels ruling, in no way affects the present case and this Honorable Court's original holding.

V

MUNICIPAL LAW - WHERE THERE IS NO DEFINITE POLICY AND THE FAILURE TO TRAIN CASES

There are numerous cases which deal with state of mind where there is no definite policy and it is sought to imply policy by custom or by individual acts which should have been known by the policy-makers. There is sought to be established a policy of (intentionally or recklessly) having no policy. Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986); Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986); Gilmere v. City of Atlanta, 744 F.2d 1495 (11th Cir. 1985) (En Banc); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985).

This Honorable Court has clearly recognized that the case at bar does not fall under this category.

ORIGINAL OPINION - dated December 17, 1985:

5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, U.S. , 105 S.Ct. 2427, 85 L.Ed.2d 791. (At pg. 4) (Emphasis supplied)

VI

GARNER V. CITY OF MEMPHIS AND THE COURT'S CHARACTERIZATION OF THE POLICY HEREIN

In Memphis Police Department v. Garner, 471 U.S.____, 105 S.Ct.____, 85 L.Ed.2d 1 (1985), the United States Supreme Court squarely upheld the United States Court of Appeals determination that the use of force in circumstances such as herein was not permissible. We submit

1. The first part of the report deals with the general situation of the country and the progress of the work during the year.

2. The second part of the report deals with the results of the work done during the year. It is divided into two main sections: the first section deals with the results of the work done in the field, and the second section deals with the results of the work done in the laboratory.

3. The third part of the report deals with the conclusions drawn from the results of the work. It is divided into two main sections: the first section deals with the conclusions drawn from the results of the work done in the field, and the second section deals with the conclusions drawn from the results of the work done in the laboratory.

that the holding of the Supreme Court in Garner, supra, is consistent with this Court's Original Opinion and the use of deadly force as used herein was found by the Supreme Court to be unconstitutional. Florida is mentioned in Footnote number 14 as following the common law rule on deadly force, which was specifically found to be Constitutionally impermissible. Garner involved the rights of a fleeing felon and not those of an innocent bystander. It was a 1983 action by the felon and the Court of Appeals utilized Fourth Amendment and due process analysis and the Supreme Court appears to only consider the Fourth Amendment aspect. It is hard to imagine that the rights of the felon are greater, rather than equal to or less than that of an innocent bystander. Day v. Lea, 599 F.Supp 25 (M.D. La. 1984). Therefore, although there may not have been a seizure



of the decedent herein within the Fourth Amendment, there is certainly a lack of due process attendant upon the deprivation of her liberty and the taking of her life, sans process.

Garner v. Memphis Police Dept.,
710 F.2d 240 (6th Cir. 1983) (En Banc)

* * *

An analysis of the facts of this case under the Due Process Clause of the Fourteenth Amendment leads us to a similar result. That clause prohibits any State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts. (At pg. 246) (Emphasis supplied)

* * *

The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons:

The use of deadly force is not justifiable. . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code (3.07(2)(b))
(Proposed Official Draft, 1962).
(At pg. 247) (Emphasis supplied)

It is without doubt that the chase have involved a substantial risk of injury to innocent persons. It is the absence of this Key Factor (Public Safety) in the City of Miami's policy which makes it impermissible and inadequate.

The Policies of The International Chiefs of Police and Metropolitan Dade County provided adequate role models for the jury.

This Honorable Court has aptly characterized the City of Miami's policy, thusly:

Original Opinion - dated December 17, 1985:



* * *

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). There the jury found that the defendant-City was grossly negligent in the training of its officers and that, as a result of this negligence, its officers engaged in a shooting barrage which resulted in the death of an innocent victim. The court wrote that:

"[i]f there is a reckless disregard for human life and safety prevalent among the city's police officers which threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights. Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force is satisfied."

767 F.2d at 170.



Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and safety of innocent persons would meet with the approval of, and indeed was required by, the City policymakers. As such, municipal liability under Section 1983 was adequately shown. See also Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985) (where police set up deadman roadblock to stop driver of car who sped up and would not stop for police, and who, though known to have mental problems, did not have outstanding arrest warrants, innocent passenger in chased car injured when car crashed into roadblock had standing to sue municipality based on allegation that the police had a practice of ignoring the Fourth Amendment proscription against unreasonable seizures). Accord Trezevant v. Tampa, 741 F.2d 336 (11th Cir. 1984) (where plaintiff's wrongful incarceration resulted from procedures which failed to protect constitutional rights, municipal liability is warranted). (At pgs. 4-5) (Emphasis supplied)

VI

ADEQUATE AND INADEQUATE POLICY

It is respectfully submitted that the use of "adequate" and "inadequate" are proper nomenclature to describe permissible and impermissible Section 1983 municipal policy parameters.

Bartholomew v. Fischl,
782 F.2d 1148 (3rd Cir. 1986)

* * *

See, e.g., Brandon v. Holt, ____ U.S. ____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) (reversing finding of no municipal liability where plaintiff showed existence of a policy of police procedures inadequate to discover officer misconduct); Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) (imposing municipal liability based upon policy requiring that city employees' complaints be passed up "chain of command"); Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981) (holding city liable because of policy delaying investigation of complaints of police misconduct until underlying charges against complainant were resolved)... (At pg. 1153) (Emphasis supplied)

Trezevant v. City of Tampa,
741 F.2d 336 (11th Cir. 1984)



* * *

[1] In the case at bar, Mr. Trezevant's incarceration was the result of numerous mistakes which were caused by the policemen and deputies carrying out the policies and procedures of the City of Tampa and the HBCJ. There was certainly sufficient evidence for the jury to find, as it did, that pursuant to official policy Officer Eicholz escorted Mr. Trezevant to central booking where he was to be incarcerated until the HBCJ personnel could process the paper work for his bond. We cannot view the actions of Officer Eicholz and the jailer in a vacuum. Each was a participant in a series of events that was to implement the official joint policy of the City of Tampa and the HBCJ.⁴ The failure of the procedure to adequately protect the constitutional rights of Mr. Trezevant was the direct result of the inadequacies of the policy established by these defendants. The trial court correctly denied the motions for directed verdict and submitted the case to the jury.

(At pg. 340) (Emphasis supplied)

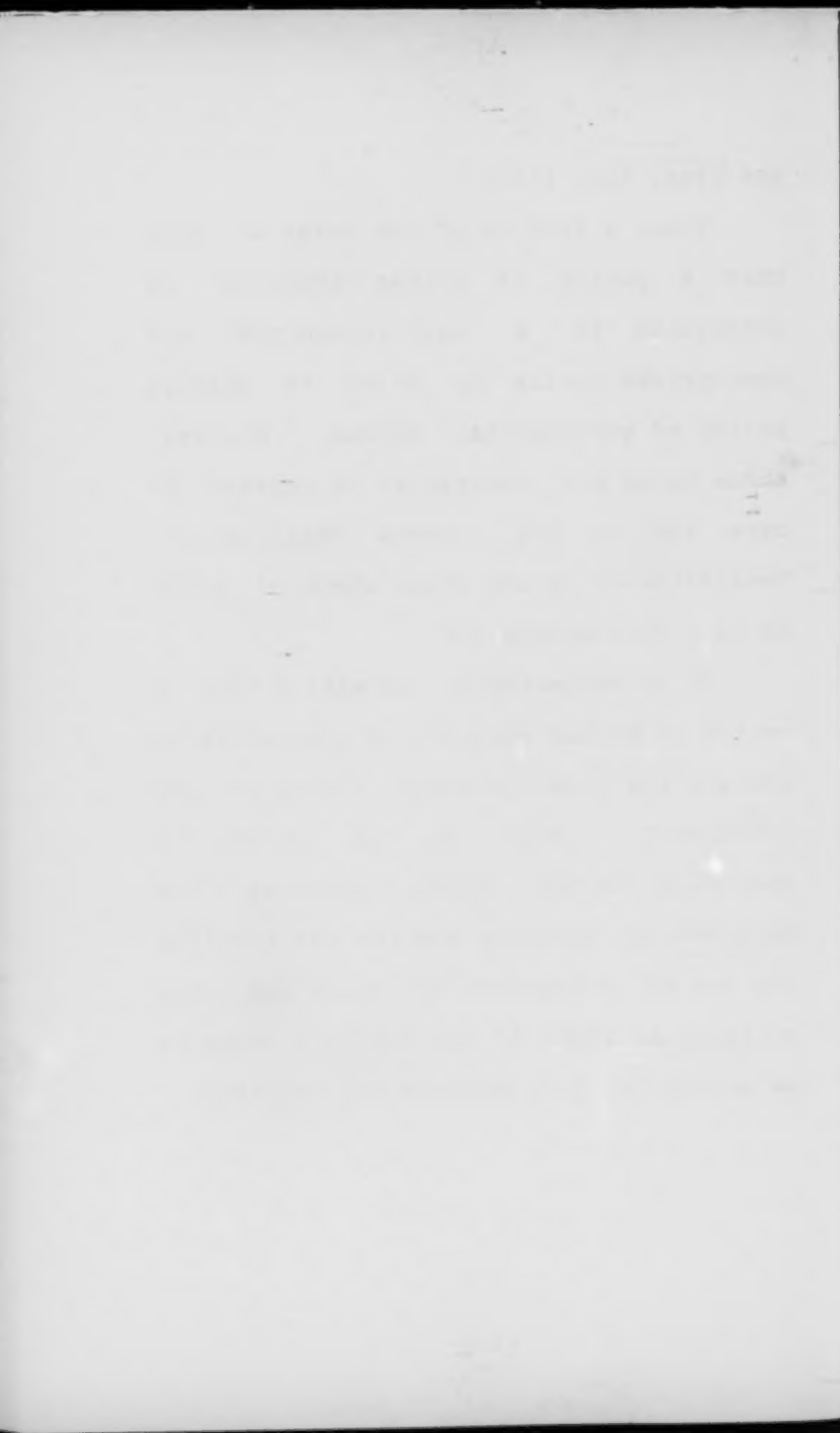
Please see also: Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982); Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977); City of Amarillo v. Langley, 651 S.W. 2d



906 (Tex. App. 1983).

Thus, a finding of the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure policy of governmental bodies. Moreover, these terms are neutral as to degrees of care and do not connote "Negligence", "willfulness" or any other state of mind, as well they should not.

It is respectfully submitted that a policy is either adequate or inadequate to protect the constitutional rights of the individual. This is, of course, a measuring device which balances the governmental activity and the availability and use of safeguards to carry out that activity in light of the public's right to be secure in their persons and property.



VII

THE EVIDENCE WAS SUFFICIENT AND NO ERROR WAS PRESERVED

In addition to the merits of the discourse above, it is submitted that the quality and quantity of the evidence presented at trial was sufficient for the case to be submitted to the jury and the unobjected to instructions and verdict form permitted the jury findings.

A. SUFFICIENCY OF EVIDENCE.

In regard to sufficiency of the evidence to defeat a directed verdict, if the degree of adequacy of the policy is to be examined, expert testimony was presented to the effect that Appellant's policy was "incredibly reckless" and "unconscionable". This Court's own evaluation of the evidence led it to conclude in its Original Opinion that:

1. "... because of this policy .
... innocent people were placed in obvious



jeopardy and an innocent person - Mrs. Rolle - was actually killed."

2. "Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties." ("Similarly" therein was a comparison by this Court to the phrase "reckless disregard for human life" noted in the prior paragraph of the Court's Opinion).

If the state of mind of the policy-makers is to be judged, then it is obvious that without Watergate's Deep Throat behind closed doors, it would be impossible to prove by direct evidence. No governmental, policy-making official is going to admit that the policy was intended to cause death, or that "we just did not care if innocent bystanders were killed."



Practically, if state of mind is to be the test, then it could only be proved circumstantially. Herein, the direct testimony as to the "quality" of the policy and the Court's very own characterization of such indicates that there was sufficient evidence for the jury to infer the state of mind of the policy-maker and to characterize it as whatever it is that this Honorable Court is suggesting for liability to attach.

B. UNOBJECTED TO JURY INSTRUCTIONS
AND VERDICT FORM - LIABILITY.

Once this Court is satisfied as to the sufficiency of the evidence, the next logical judicial examination should lead it to the jury instructions and verdict form.

As this Court is aware, Rule 1.470(b), Florida Rules of Civil Procedure, mandates that at the jury instruction Charge Conference "... all



objections shall be made . . ." and that "no party may assign as error the giving of any charge unless he objected thereto at such time. . ."

This Court has relentlessly enforced the clear meaning of this Rule, finding waiver of otherwise reversible error, e.g. Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985) (Jury charged with wrong elements to sustain cause of action); Collard v. Keeton, 317 So.2d 121 (Fla. 3d DCA 1975) (failure to charge jury on comparative negligence); and Fleitas v. Robinson, 273 So.2d 419 (Fla. 3d DCA 1973) (permanently scarred plaintiff did not object to omission of "disfigurement" in damage charge).

The same standard has been applied to failure to object to a form of verdict. Whitmen v. Castlewood Int'l Corp., 383 So.2d 618 (Fla. 1980); General Motors

information was to be used in the future.

The results of the study were as follows:

1. The study was conducted in a laboratory setting.

2. The study was conducted with a sample of 100 subjects.

3. The study was conducted over a period of 12 weeks.

4. The study was conducted with a control group.

5. The study was conducted with a treatment group.

6. The study was conducted with a comparison group.

7. The study was conducted with a baseline measurement.

8. The study was conducted with a post-treatment measurement.

9. The study was conducted with a follow-up measurement.

10. The study was conducted with a final measurement.

11. The study was conducted with a final evaluation.

12. The study was conducted with a final report.

13. The study was conducted with a final conclusion.

14. The study was conducted with a final summary.

15. The study was conducted with a final appendix.

16. The study was conducted with a final bibliography.

17. The study was conducted with a final index.

18. The study was conducted with a final table of contents.

19. The study was conducted with a final list of figures.

20. The study was conducted with a final list of tables.

21. The study was conducted with a final list of references.

22. The study was conducted with a final list of acknowledgments.

23. The study was conducted with a final list of appendices.

24. The study was conducted with a final list of figures.

25. The study was conducted with a final list of tables.

Corp. v. Romine, 416 So.2d 2, (Fla. 3d DCA 1982); and Davis, Inc. & INA v. City of Miami, 400 So.2d 536 (Fla. 3d DCA 1981) (where the City of Miami could collect against insurance carrier who waived error as to the jury instructions and verdict form by failure to object).

It is uncontravertable that counsel for the Appellant, CITY OF MIAMI, did not object to the jury instructions in question or the verdict form.

In specific regard to the instructions, as to the standard for municipal liability, the following constitutes the relevant portions of the Charge Conference.

Objection on behalf of the Appellant is conspicuously absent.

Transcript of Proceedings

* * *

THE COURT: There is no problem with that, but anyway--now, let's

get to the nitty-gritty of it.

Is whether or not the City of Miami had an inadequate policy in regard to police chases, and if so, whether such inadequate policy was a legal cause of the death of Doretha Rolle.

It seems to me to be right on point with what we have been talking about for the last four days.

MR. FELDMAN: That is the language employed by the supreme court in Monell.

THE COURT: Have you got a problem with that?

MS. CARDONNE: No, not as far as the wording. (T 835)

* * *

THE COURT: All right.

So, that part is okay. Now, if the greater weight of the evidence does not support the claim of the plaintiffs in that the policy of the City of Miami was adequate or that the City of Miami--that the policy of the City of Miami was not a legal cause--

MR. MAGIDSON: It should be the policy of the City of Miami, or that the policy of the City of Miami was not a legal cause.

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IN THE DEPARTMENT OF THE HISTORY OF ARTS
AND LITERATURE
OF THE UNIVERSITY OF CHICAGO
A THESIS SUBMITTED TO THE FACULTY
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
BY
JAMES H. HARRIS

CHICAGO, ILLINOIS
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THE COURT: Or that the policy of the City of Miami was not a legal cause of the death of Doretha Rolle, then your verdict on this claim, et cetera.

How about that?

MS. CARDONNE: That paragraph is okay.
(T 836-837)

In regard to the causation issue under the Section 1983 Claim, again counsel for Appellant accepted without objection the "inadequate policy" concept (T 839-840).

In fact, counsel suggested to the Court that her proposed instruction quoting (1983 verbatim would assist the jury in their deliberations on the issue of inadequate policy. This requested instruction was therefore given.

Transcript of Proceedings

* * *

MR. FELDMAN: Unless there is going to be--you know, I think the charge as given does define



what the constitutional violation is.

Now, using this, you are going to be giving them or attempting to make them scholars of the Constitution of the United States and I don't think it is possible.

MS. CARDONNE: Judge, I think it is an adequate, correct statement of what section 1983 is, which is not contained in any of their instructions.
(T 857-858)

* * *

THE COURT: I don't know. It just seems to me that plaintiffs' number four tells the jury what they have been listening to all week.

MS. CARDONNE: This is exactly right.

THE COURT: And that they had an inadequate policy in regard to chases and, if so, was it a cause of death.

MR. MAGIDSON: The Court is supposed (sic) to interpret the law and that is what the Court is doing, making the jury a constitutionally, scholarly group.

THE COURT: All right.



I am not saying it is a statement of the law. Every statement of the law does not have to go in. If I read them this, they are not going to have any idea of what I am talking about.

Deprivation of the rights and privileges and failing to protect her. Did they have a policy that was not good.

And, if so, was that policy the cause of her death. That is what we are talking about. We have been talking about it all week.

MR. MAGIDSON: That is what we are supposed to do.

Letting them know what it means, not leaving it to their whim.

MS. CARDONNE: We don't agree and then we ask that the exact statute, 1983, be read.

Somewhere in between jury instruction number four, which has been approved--

THE COURT: Let me see section 1983.

All right. I will read that.
(T 858-859)

In regard to the verdict form, in all material respects, same was unobjected to

In regard to the "damages" herein, only the Florida Standard Jury Instructions for Wrongful Death were given (6.5, 6.6, and 6.7). No other elements of damage were given to the jury for consideration, and again these instructions were agreed upon (T 874-881). If retried, the same instructions would be given again.

Therefore, it is respectfully submitted that in no instance has error been preserved (if existent) and thus, a new trial on any issue is unwarranted.

CONCLUSION

This Honorable Court has stated in its current Opinion that there was no consideration or proof that the policy-maker (the City) acted more than negligently, with either an intent to cause injury, or with reckless disregard.

We believe such an inquiry is irrelevant in order for Section 1983 liability to attach. Moreover, this Honorable Court has not stated that there was no proof as to the type of policy. The proof was directly to the effect that the City's policy was "incredibly reckless", and "unconscionable". (Testimony of Dr. Kirkham appearing at pgs. A 122-123, Appendix to Answer Brief of Appellee and hereinbefore in this Motion.)

This Honorable Court has characterized the policy of the City of Miami and the police action herein pursuant to that policy as in reckless disregard of the safety of the public.

It is hard to believe that in addition to all this, it is now necessary to go out and discern the state of mind of those who promulgated this policy.

It is submitted that the state of mind of the policy-makers is irrelevant in determining municipal liability.

It is respectfully submitted that the transmogrification by this Court of Section 1983 individual liability for random, unauthorized acts principles and its nomenclature (negligence, lack of due care, gross negligence, reckless disregard, intent, willfulness, etc.) to a Section 1983 municipal policy/liability setting is at odds with established and well-defined law of the Supreme Court.

The great concern of many that the Constitution will be trivialized by routine car accident suits in Section 1983 dress can have no countenance here:

1. The actions of the police officials were blatantly without regard to Mrs. Rolle's safety;

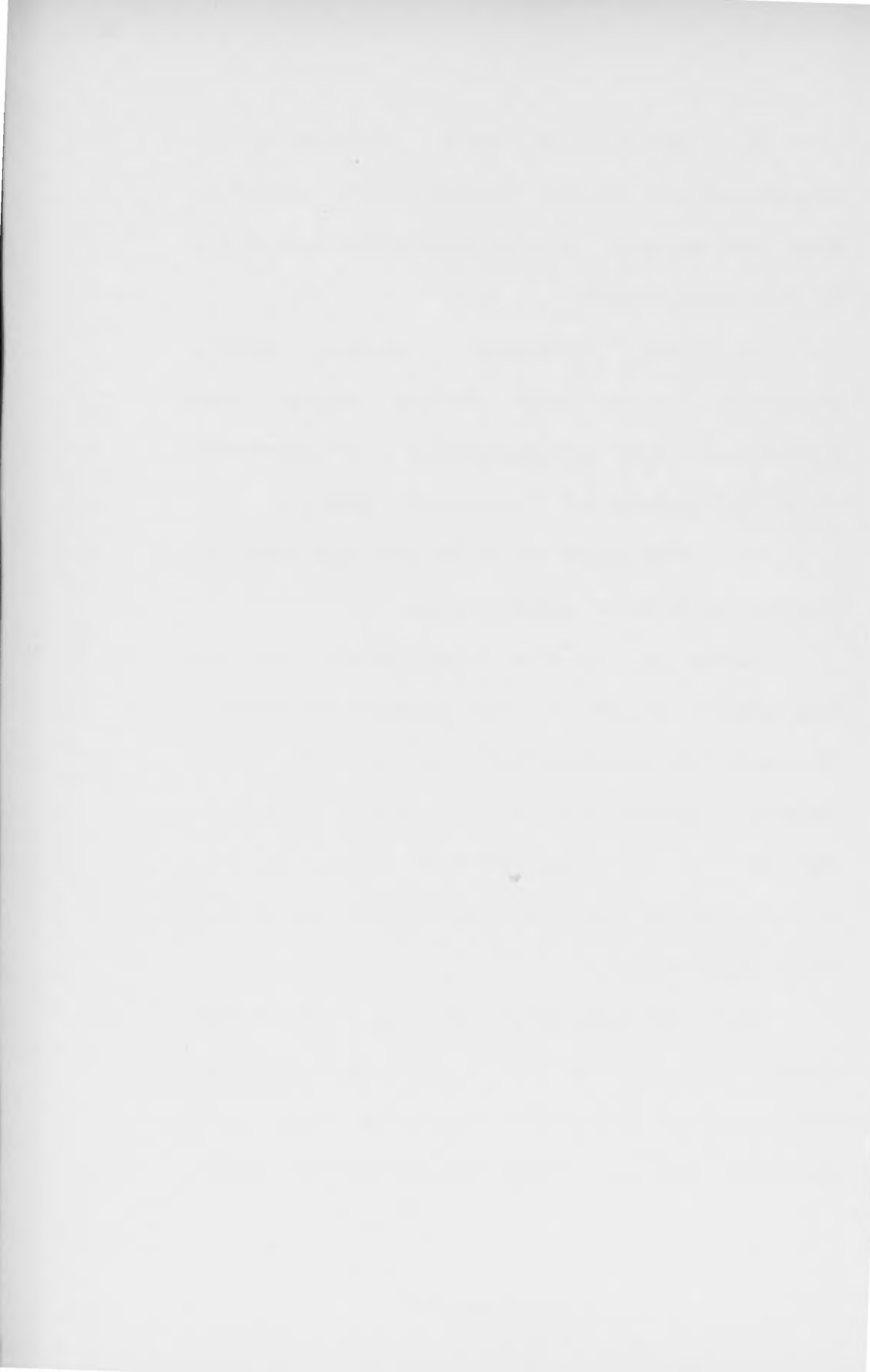
2. The police were performing an organized and highly specialized activity that was solely within the province of a Police Department;

3. The officers were acting pursuant to a city policy which was blatantly and inadequately unconcerned with the safety of civilians; and

4. The loss of life and the loss of family were most substantial.

Where it is the individual against the entire weight of the Government acting through its promulgated policy, it would indeed appear to trivialize society's values by minimizing the loss it has occasioned by setting impossible goals for full reparation.

The consequences of no respondeat superior liability for a municipality, has received no critical analysis nor case mention, but it would appear to be worth



at least a passing note. Because the traditional, easy manner of establishing liability, respondeat superior, is inapplicable regardless of how heinous the individual's conduct is, it is hard to justify further restrictions by making the policy parameter other than adequate or inadequate to protect Constitutional rights. It is only through a policy that a municipality can be liable. If, in fact, the state of mind of the policy-makers is the relevant examination, then the norm of Section 1983 practice would be to join all policy-makers, individually and personally. Pragmatically, in view of the elusive nature and imprecise daily application of the adverse party and adverse witness roles, each policy-making member of the body politic would be joined as an individual defendant. Also, a finding of recklessness would be



conclusive as to each person's individual liability, as well as the entity's liability.

We respectfully pray that this Honorable Court grant the Rehearing prayed for, recede from its Opinion on Rehearing, Reinstate its Original Opinion herein with a simple explanation that Daniels is inapplicable, or failing that, grant a Rehearing en banc and/or certify the cause to the Florida Supreme Court as passing on a question of great public interest.

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Dated at Miami, Dade County, Florida,
this 24th day of April, 1986.

/s/
Donald Feldman

/s/

Charles M. Levy

Respectfully submitted,
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FELDMAN & LEVY, P.A.
Attorneys for Appellee
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130

By: /s/

Donald Feldman

By: /s/

Charles M. Levy

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing or For Rehearing En Banc, or Alternatively, For Certification to The Florida Supreme Court was this 24th day of April, 1986, mailed and/or hand-delivered to the following: Lucia Allen Dougherty, City Attorney and Gisela Cardonne, Deputy City Attorney, 169 East Flagler Street, Suite #1101, Miami, Florida 33131; Thomas M. Pflaum, Esq., Simon, Schindler, Hurst & Sandberg, 1492 South Miami Avenue, Miami, Florida 33130.

THE HISTORY OF THE

REIGN OF
HIS MOST EXCELLENT
MAYESTY
JAMES THE FIRST
BY
JOHN BURNET
OF
GLASGOW

IN TWO VOLUMES.

LONDON, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard, 1679.

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By: /s/
Donald Feldman

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IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

THE CITY OF MIAMI, **

Appellant, **

vs. ** CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as **

Personal Representa- **

tive of the Estate **

of Doretha a/k/a **

Dorothea Rolle, **

Deceased, **

Appellee. **

MOTION FOR REHEARING OR REHEARING EN BANC
AND/OR CLARIFICATION OF OPINION ON SECOND
MOTION FOR REHEARING AND/OR CERTIFICATION
TO THE FLORIDA SUPREME COURT

COMES NOW Plaintiff/Appellee, GENEVA
HARRIS, and respectfully requests that
this Honorable Court grant a Rehearing or
Rehearing En Banc and/or Clarification of
Opinion on Second Motion for Rehearing
and/or Certification to the Florida
Supreme Court and for grounds would state

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C. 20250

OFFICE OF THE ASSISTANT SECRETARY

WASHINGTON, D. C. 20250

MEMORANDUM FOR THE ASSISTANT SECRETARY

FROM: [Name]

SUBJECT: [Subject]

1. [Text]

2. [Text]

3. [Text]

4. [Text]

5. [Text]

6. [Text]

7. [Text]

8. [Text]

9. [Text]

10. [Text]

11. [Text]

12. [Text]

13. [Text]

14. [Text]

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20. [Text]

21. [Text]

22. [Text]

23. [Text]

24. [Text]

25. [Text]

26. [Text]

27. [Text]

28. [Text]

29. [Text]

30. [Text]

that this Honorable Court has failed to consider and take into account critical and germane matter.

I

JURISDICTION

We are well aware of Florida Appellate Rule 9.330(b) and its one rehearing rule. This Motion for Rehearing does not fall within the restrictive purview of that Rule as it is an original Motion addressed to the particular decision of this Honorable Court dated June 3, 1986. "This second opinion on rehearing" charges the entire basis of the Court's previous ruling on Rehearing by writing an additional or supplementary opinion in the case.

HONORABLE COURT'S OPINION ON SECOND MOTION
FOR REHEARING
(June 3, 1986)

* * *

This second opinion on rehearing
is in response to the motion of



the plaintiffs-appellees. They complain that in the first rehearing (sought by the Defendant-City) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, we note that in the still more recently decided case of Pembaur v. Cincinnati, _____ U.S. _____, _____, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under Section 1983) attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will



have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.
(At pgs. 1-2) (Emphasis supplied)

The Court has articulated an entirely new rule of law governing this case and has imposed an entirely new burden on GENEVA HARRIS to meet at a new trial.

Therefore, this Motion For Rehearing which is directed specifically to this Honorable Court's Decision on Second Motion for Rehearing is permissible.

Dade Federal Savings & Loan Association v. Smith, 403 So.2d 995 (Fla. 1st DCA 1981)

ON FURTHER MOTION FOR REHEARING

* * *

[6] Appellee has filed a motion to reissue mandate in this cause (which was recalled upon the filing of the second motion for rehearing) contending that the second motion for rehearing is not permissible. Florida Appellate Rule 9.330(b), relating to motions for



rehearing or clarification,
states as follows:

"A party shall not file more
than one such motion with
respect to a particular
decision."

Here, in ruling upon appellant's
first motion for rehearing, we
found it necessary to, and did,
change the entire basis for our
previous ruling, writing a
supplementary opinion in the
case. Since that opinion
changes the entire basis for the
ruling of the first opinion, we,
therefore, consider it to be a
new decision to which a new
motion for rehearing may be
filed.

The motion for rehearing is
denied.

(At pg. 999) (Emphasis supplied)

II

WHAT STANDARD

A. The Daniels Standard:

HONORABLE COURT'S OPINION ON REHEARING

(April 1, 1986)

* * *

. . .The jury was not asked to
consider, and the plaintiffs
were not called upon to prove,
whether in establishing this

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT ON THE PROGRESS OF THE WORK DURING THE YEAR 1900-1901

BY

JOHN EDGAR HOOVER

CHICAGO, ILL., 1901

official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

* * *

They should be given the opportunity, under Daniels, to prove the "more than negligence" that Daniels requires."

(At pgs. 2-4) (Emphasis supplied)

B. The Pembaur Standard:

HONORABLE COURT'S OPINION ON
SECOND MOTION FOR REHEARING
(June 3, 1986)

. . . Pembaur v. Cincinnati,
U.S. 106
S.Ct. 1292, 1300, 89 L.Ed.2d
452, 465 (1986), a plurality of
the Court held "that municipal
liability under Section 1983
attaches where--and only
where--a deliberate choice to
follow a course of action is
made from among various



alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."

* * *

. . .they will have an opportunity to supply the missing proof upon a retrial of the case.

(At pg. 2) (Emphasis supplied)

It is entirely unclear from this Honorable Court's Opinion above whether GENEVA HARRIS will be required to prove "more than negligence by the policymakers" (state of mind) or "a deliberate choice to follow a course of action from among various alternatives" by these same policymakers. It is conceivable that because of the phrasing of this Honorable Court's Opinion on Second Motion For Rehearing, she will be required to prove both. ("Without now debating the merits of the plaintiffs' argument. . .with this clarification, we adhere to our opinion on

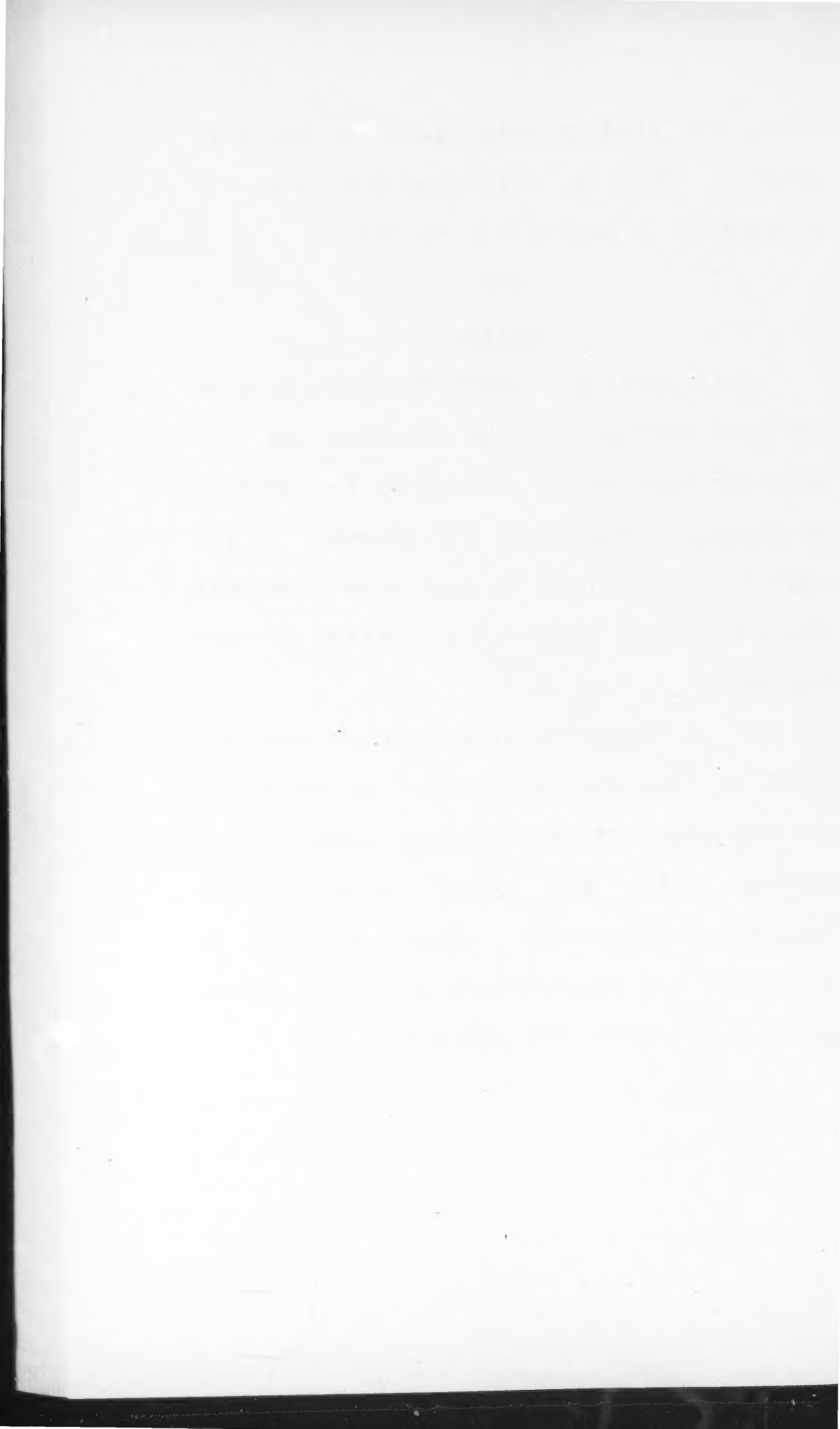
rehearing filed in this cause on April 1, 1986"). What is clarified and what is adhered to is impossible to tell.

III

Daniels

This Honorable Court does not clearly indicate whether it is adhering to its Original Opinion on Rehearing in regards to Daniels' applicability herein. The best we can discern is that this Honorable Court will not debate the merits of our argument.

It is respectfully submitted that the Panel of this Honorable Court is aware of our argument, can evaluate it without any further help, and should clearly hold Daniels inapplicable. Other members of the Court are respectfully directed to our previous PETITION FOR REHEARING, etc.



IV

Pembaur: One Instance Of Conduct
(Single Decision v.
Express Rule and Regulations)

It is virtually impossible to write that which follows because we truly and humbly submit that it should never need be written.

In this regard the Panel of this Honorable Court has previously held that the policy of The City of Miami in regard to police chase was established by express rules and regulations.

ORIGINAL OPINION OF THIS HONORABLE COURT
(December 17, 1985)

5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, U.S. _____, 105 S.Ct. 2427, 85 L.Ed.2d 791.
(At pg. 4) (Emphasis supplied)



This was similarly the case in Monell. Is it to be imagined that Pembaur would now require Mrs. Monell, if decided today, to show that "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"?

It is submitted that the existence of the written policies and procedures in Monell, which were designed to apply in all instances, would make such an inquiry meaningless.

However, if, as suggested herein, it must be shown that the actual policy makers were aware of all, or most, or some of the alternatives when they established their actual policy, the Monell and Pembaur courts would be most shocked.

It is respectfully submitted that this Honorable Court is, indeed, again putting a state of mind requirement into municipal policy making liability. Daniels would not dictate or allow this, nor would Monell or Pembaur.

We are now back into the prohibited state of mind inquiry pretermitted by Owen vs. City of Independence; Brandon vs. Holt; and Kentucky vs. Graham.

Pembaur was clearly not concerned with states of mind of policymakers, except to determine when it was that a policy was actually being made by an individual acting in one particular situation; making a decision (policy) on the telephone. The Court was concerned with determining when an individual action or decision rose to the level of policy (afortiori, when no expressed rule or regulation previously existed).



Justice Brennan speaking for the clear majority of the court directly stated the issue, comparing it to Monell.

Pembaur v. Cincinnati,
U.S., 106 S.Ct.
1292, 89 L.Ed.2d 452 (1986)

* * *

Justice Brennan delivered the opinion of the Court, except as to Part II-B.

[1a] In Monell v. New York City Dept. of Social Services, 436 US 658, 56 L Ed 611, 98 S Ct 2018 (1978), the Court concluded that municipal liability under 42 USC Section 1983 [42 USCS Section 1983] is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature. . ." Id., at 691, 56 L Ed 2d 611, 98 S Ct 2018. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

(At 89 L.Ed.2d pg. 457)
(Emphasis supplied)

The majority opinion in Pembaur goes on to clearly show that liability in Monell was pursuant to a written policy



which was to be followed consistently over time (that sub judice)

Pembaur v. Cincinnati, supra.

* * *

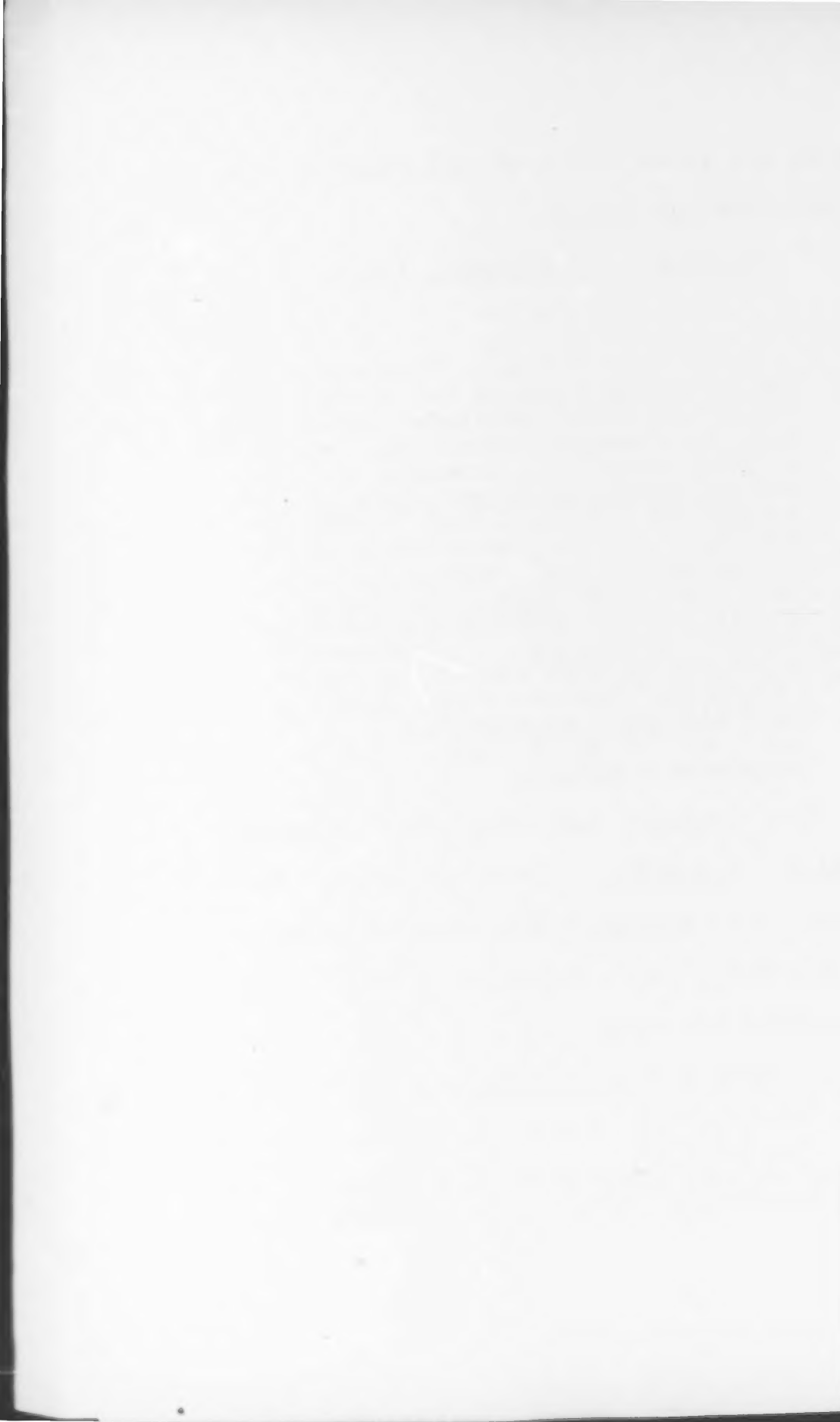
. . .to be sure, "official policy" often refers to formal rules or understandings--often but not always committed to writing--that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in Monell itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary.
(At 89 L.Ed.2d pg. 462)
(Emphasis supplied)

The Pembaur majority then extends Monell; expanding its contours for liability to singular decisions by single individuals (an expressed rule or regulation was absent).

Pembaur v. Cincinnati, supra.

* * *

. . .That conclusion is entirely consistent with our holding



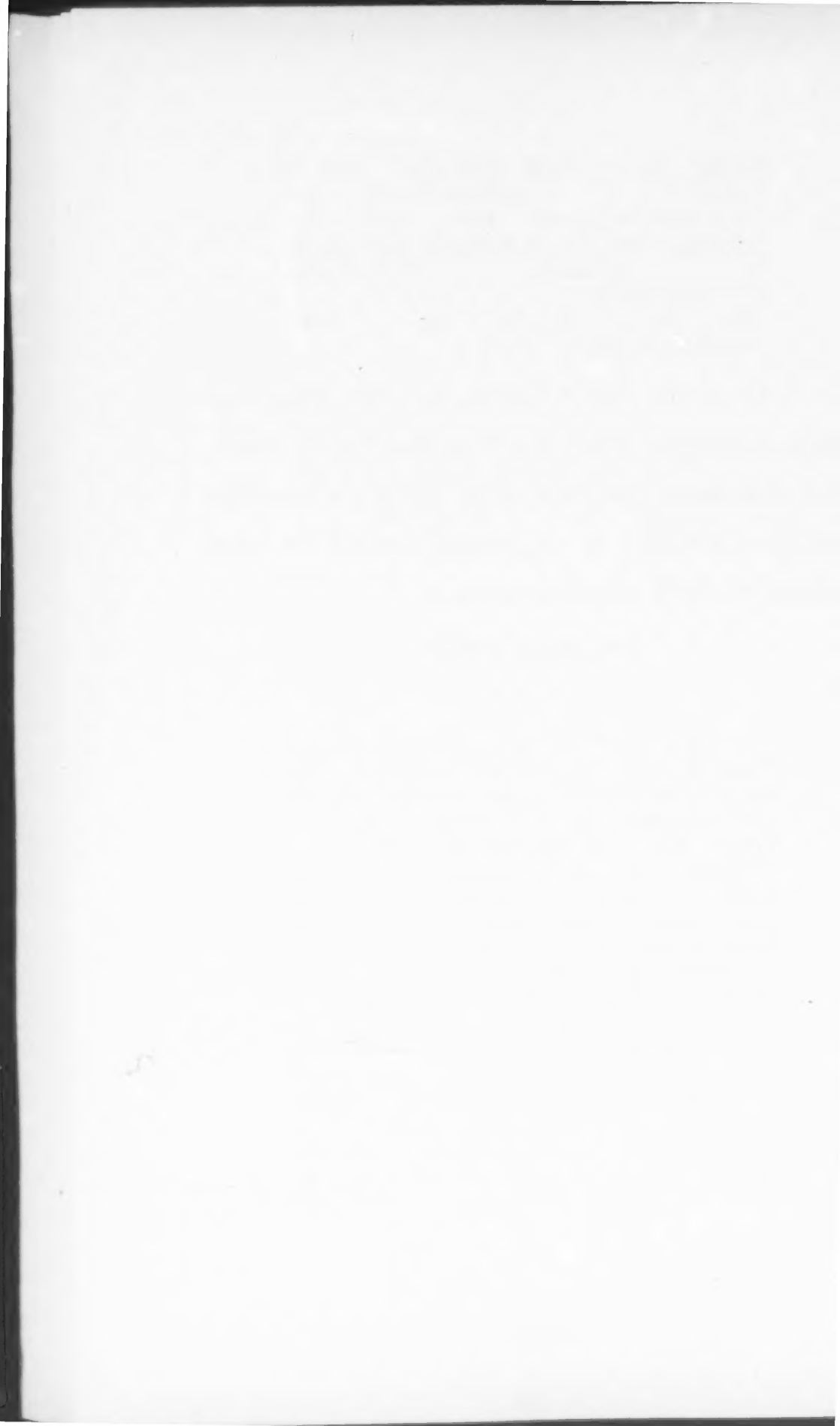
today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.
(At 89 L.Ed.2d pg. 465)
(Emphasis supplied)

It is in this context, and only in this context, that the Supreme Court made the statement relied on by this Honorable Court, to-wit: "deliberate choice -- from among various alternatives."

Pembaur, supra.

* * *

. . .To hold a municipality liable for actions ordered by such officers exercising their policy-making authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the city councils in Owen and Newport. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under Section 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various



alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See Tuttle, supra, at _____, 85 L Ed 2d 791, 105 S Ct 2427 ("'policy' generally implies a course of action chosen from among various alternatives").

(At 89 L.Ed.2d pg. 465)
(Emphasis supplied)

We respectfully submit that to take Pembaur, which is probably the single most expansive decision on municipal liability since Monell and Owens, written by the Justice who is consistently the most vocal and consistent advocate of expanding the contours of municipal liability, and turn it into a small noose to choke off municipal culpability -- would suggest that which follows.

V
Justice Must Have The Appearance of
Justice
(Not a "Debate")

In this great land of individual liberty, we have the right not only to

justice, but also the appearance of justice. Justice is not good enough if it does not appear to be such.

We have strenuously objected to the procedures followed by this Honorable Court:

1. It appears to have countenanced a blatant abuse of the Florida Rules of Appellate Procedure by The City of Miami subsequent to the appearance of entirely new counsel, after this Honorable Court's original opinion. The City of Miami's new counsel filed its Petition for Rehearing and we asked this Honorable Court to strike same. Sag Harbour Marine v. Fickett, 484 So.2d 1250 (Fla. 1st DCA 1986) well states our point.

2. Not only have we objected to the City of Miami's conduct, but we also stated a dissatisfaction with the entire procedure utilized by this Honorable Court



by not allowing HARRIS an opportunity to comment on Daniels before this Honorable Court applied it herein:

Motion For Rehearing For Rehearing En Banc Or Alternatively For Certification To the Florida Supreme Court
(Set forth here for ready reference)

* * *

II
A BIT OF CANDOR
OR
WHY BOTHER

A. AFTER THIS HONORABLE COURT'S OPINION OF DECEMBER 17, 1985:

1. December 31, 1985 (Amended January 7, 1986): The CITY OF MIAMI filed a Motion for Rehearing En Banc, or Alternatively, for Certification to the Florida Supreme Court.

This document was filed by totally new counsel and it was as if the entire appellate procedure was first beginning (or being re-written).

It was thought that this document was abusive, irreverent, and fallacious, at least in patent disregard of the Florida Appellate Rules;

2. January 7, 1986: GENEVA HARRIS filed her "Response to and Motion to Strike, etc."

To the best of our

1

1

knowledge, this Honorable Court has not addressed this document;

3. January 13, 1986: CITY OF MIAMI filed its Reply to Appellee's Motion to Strike.

This document just reenforced the prior infirmities of the Motion for Rehearing, etc. and was even more blatantly in violation of the Florida Appellate Rules;

4. January 29, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority which listed cases, the latest of which was decided at least five (5) years prior to oral argument of this cause;

5. February 3, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority (Daniels v. Williams and Davidson v. Cannon).

As the cases were decided January 26, 1986, it could not be argued that this was improper;

6. February 27, 1986: The CITY OF MIAMI filed its Supplemental Memorandum giving its formal "PRESUMPTUOUS" opinions on Daniels and Davidson. This, once again in clear violation of the Florida Appellate Rules; and

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LIBRARY

1. The first part of the book is devoted to a general survey of the history of the subject. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are stated in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

2. The second part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are stated in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

3. The third part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are stated in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

4. The fourth part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are stated in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

5. The fifth part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are stated in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

7. April 1, 1986: This Honorable Court entered its Order on Rehearing.

B. AT PRESENT:

1. GENEVA HARRIS is now in the position of having, not to help direct an opinion (which is her right) but of trying to undo what has already been written for all to see. To convince this Court that which has now been twice done is wrong, rather than to argue what is once done is right, is an unfair, but a present burden, which we most strongly object to.

2. Frankly, there is a very strong temptation to just let be, what is. But, the consequences of leaving this opinion as it is, are perceived to be so great--a very real and unwarranted death in this District and for these Plaintiffs of Section 1983 - that not even the "lawsuit crisis" or the "insurance crisis" or other ill conceived rhetoric will let us take an easy way out.

We are convinced, therefore, that what is to be seen, will be seen; what is to be reasoned, will be reasoned; and what need be perceived, will be discerned. To this end we proceed.

(At pgs. 11-12) (Emphasis supplied)



Instead of addressing and resolving the arguments presented, this Honorable Court states: "WITHOUT NOW DEBATING THE MERITS OF THE PLAINTIFF'S ARGUMENT. . ."

We verily believe that the use of the word "Debating", rather than for example "addressing", "considering" or "resolving" might tend to indicate an adversarial, rather than an adjudicatory posture of the Court.

We further verily believe that to then immediately resolve this case on the "still more recently decided case of Pembaur v. Cincinnati - - -" without any ratio decidendi by this Court and solely on the basis of a quote taken completely out of its intended context, does little to add to the appearance of justice.

We do believe that it may well be that appearance is not fact, but we must also note that the tenor of the Court's

most recent opinion appears defensive.

It must be stressed that the Policy of the City of Miami was not an ad hoc one, but was formally adopted and in writing. There is a Manual of Rules and Regulations. There is also a General Orders of the Miami Police Department. These documents bear the names amongst others of: Bernard L. Garmire, Chief of Police; Walter E. Headley, Chief of Police; P.W. Andrews, City Manager; and M.L. Reese, City Manager. It is virtually impossible to tell which of these introduced, readopted, ratified, or retained any particular directive or order. Please see: Plaintiffs' Exhibits 2 and 3; Motion to Supplement the Record (3 September 1985); Order granting said motion (5 September 1985); and the record as supplemented.



We respectfully submit that the Panel decision now lays an additional burden on GENEVA HARRIS, one which is probably impossible to meet by proof.

CONCLUSION

We respectfully submit that this Honorable Court's reliance on Daniels was inapposite and its reliance on Pembaur was inappropriate. GENEVA HARRIS and the decedent's minor children should be allowed to receive the benefits which this Honorable Court's original opinion recognized, obtained pursuant to a trial fairly and legally conducted. As we are not Constitutional scholars, we cannot and have no desire to debate this Honorable Court. We only hope that we have ably advised the Court of our understanding of the applicable law.

We express a belief, based on a reasoned and studied professional



judgment, that the Panel decision is of exceptional importance.

Dated at Miami, Florida, this 10th day of June 1986.

By: /s/
Donald Feldman

By: /s/
Charles M. Levy

Respectfully submitted,
ABRAMSON & MAGIDSON, P.A.
FELDMAN & LEVY, P.A.
Attorneys for Appellee
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305 374-0007

By: /s/
Donald Feldman

By: /s/
Charles M. Levy

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing, etc. was this 10th day of June 1986, mailed to the following:



Lucia A. Dougherty, City Attorney
Suite 1101, 169 E. Flagler Street
Miami, Florida 33131;

Thomas M. Pflaum, Esq.
Simon, Schindler, Hurst & Sandberg
1492 South Miami Avenue
Miami, Florida 33130.

FELDMAN & LEVY, P.A.
Attorneys for Appellees
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone No. (305)374-0007

By: /s/
Donald Feldman

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION
DIVISION

CASE NO. 82-7845
(CA-30)

GENEVA HARRIS,
as Personal Rep-
resentative of the
Estate of DORETHA
ROLLE, Deceased,

Plaintiffs,

v.

CITY OF MIAMI, a
municipal corpora-
tion,

Defendant.

FINAL JUDGMENT IN
FAVOR OF GENEVA
HARRIS, AS PERSONAL
REPRESENTATIVE OF THE
ESTATE OF DORETHA
ROLLE, DECEASED, ON
BEHALF OF SURVIVORS,
DERRECK S. ROLLE,
AARON ROLLE, GLENDORA
D. ROLLE AND GENEVA
HARRIS AND AGAINST THE
CITY OF MIAMI, A
MUNICIPAL CORPORATION.

This is a FINAL JUDGMENT in favor of
GENEVA HARRIS, as Personal Representative
of the Estate of DORETHA ROLLE, deceased,
on behalf of survivors, DERRECK S. ROLLE,
AARON ROLLE, GLENDORA D. ROLLE and GENEVA
HARRIS and against the CITY OF MIAMI, a
municipal corporation.



This cause was tried by and through a Jury Trial between May 29, 1984 and June 1, 1984. On June 1, 1984, this matter was submitted to a Jury and resulted in a verdict in favor of the Plaintiffs and against the Defendant, as follows:

WE, THE JURY, return the following verdict.

1. Did the City of Miami have an inadequate policy in regard to police chases that was a legal cause of the death of DORETHA ROLLE?

YES X NO

2. Was there negligence on the part of the City of Miami which was a legal cause of the death of DORETHA ROLLE?

YES X NO

If your answers to both of the above questions are "NO", then your verdict is for the Defendant and you should not proceed further except to date and sign this verdict form and return it to the Courtroom.



If your answer to either of the above questions is "YES", please answer question "3".

3. What is the total amount (100%) of any damages sustained by DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS caused by the death of DORETHA ROLLE.

Total damages of:

DERRECK S. ROLLE \$165,000.

AARON ROLLE \$165,000.

GLENDORA D. ROLLE \$165,000.

GENEVA HARRIS \$100,000.

SO SAY WE ALL THIS 1 day of JUNE 1984.

/s/
FOREPERSON

Accordingly, in accordance with the foregoing, it is therefore:

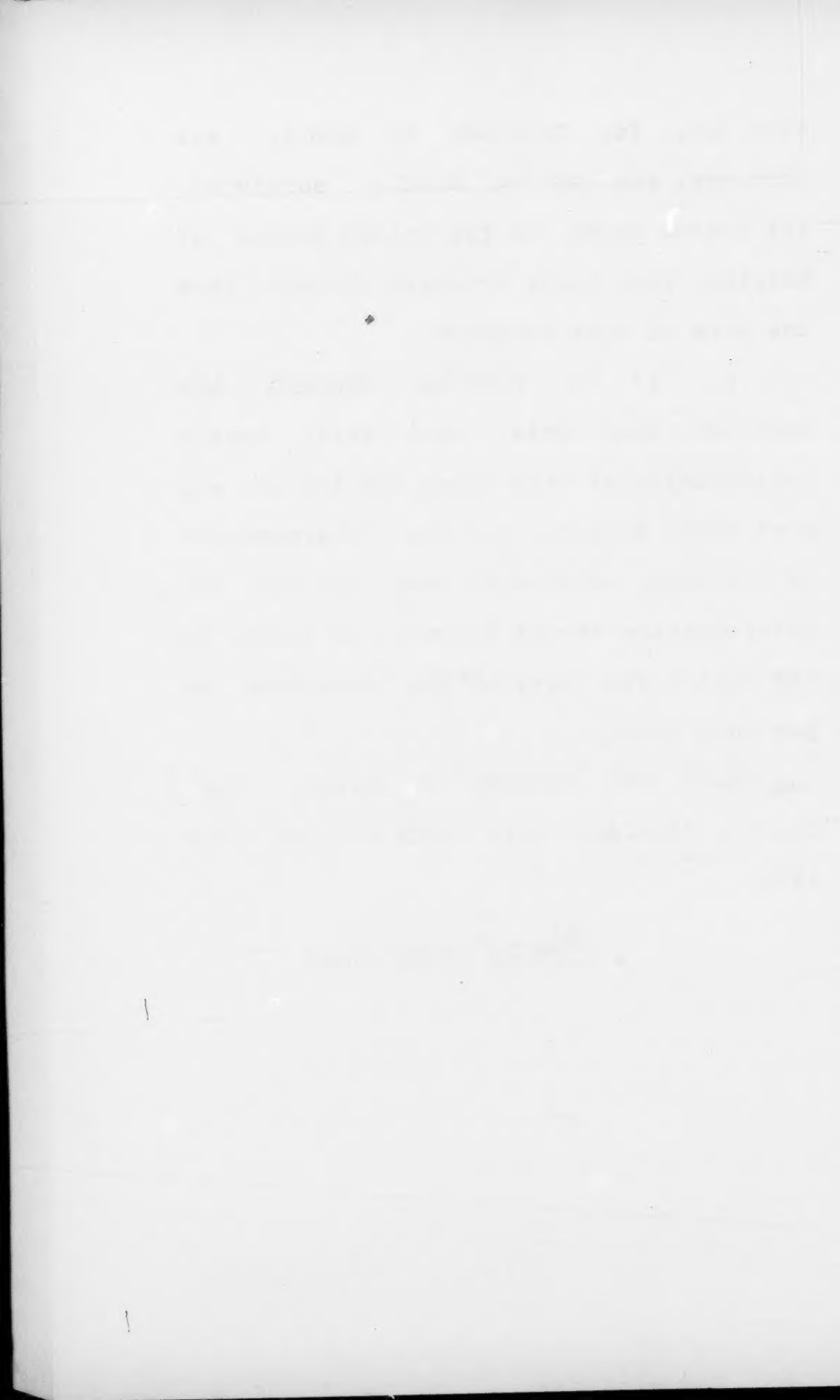
1. ORDERED AND ADJUDGED that FINAL JUDGMENT be and it is hereby entered in this cause in favor of the Plaintiffs and against the Defendant, CITY OF MIAMI, in the sums of \$165,000. for DERRECK S. ROLLE; \$165,000. for AARON ROLLE;

\$165,000. for GLENDORA D. ROLLE; and \$100,000. for GENEVA HARRIS, survivors, all lawful money of the United States of America, plus legal interest thereon from the date of this Judgment.

2. IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this cause for any and all post trial motions; for the determination of statutory attorneys' fees; and for the determination of the taxation of costs by the Plaintiffs against the Defendant as per this Order.

DONE AND ORDERED at Miami, Dade County, Florida, this 12th day of June 1984.

/s/
CIRCUIT COURT JUDGE



Conformed copies furnished to:

Donald Feldman, Esq.
Feldman & Levy, P.A.

David L. Magidson, Esq.
Abramson & Magidson, P.A.

Gisela Cardonne, Esq.

CERTIFICATE OF SERVICE

I, DONALD FELDMAN, being over the age of 18 years, hereby certify that I have this fourteenth day of October, 1986, served three copies of the foregoing Appendix to Petition For Writ of Certiorari to the District Court of Appeal of Florida, Third District, to all counsel of record listed below with their mailing addresses, by mailing said copies in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, Miami, Florida.

Lucia A. Dougherty
City Attorney
169 E. Flagler Street
#1101
Miami, Florida 33131; and

Thomas M. Pflaum, Esq
Simon, Schindler, Hurst
& Sandberg
1492 South Miami Avenue
Miami, Florida 33130.

FELDMAN & LEVY, P.A.
Counsel for the Petitioner
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone No. (305)374-0007

By: Donald Feldman
Donald Feldman

DEC 13 1986

JOSEPH F. SPANIOL, JR.
CLERK

(3)
No. 86-640

**In The
Supreme Court of the United States**

October Term, 1986

— o —
GENEVA HARRIS, as Personal Representative of
the Estate of Doretha a/k/a Dorothea Rolle, Deceased,
Petitioner,

vs.

THE CITY OF MIAMI,
Respondent.

— o —
**On Petition For Writ of Certiorari From
The Florida Third District Court of Appeal**

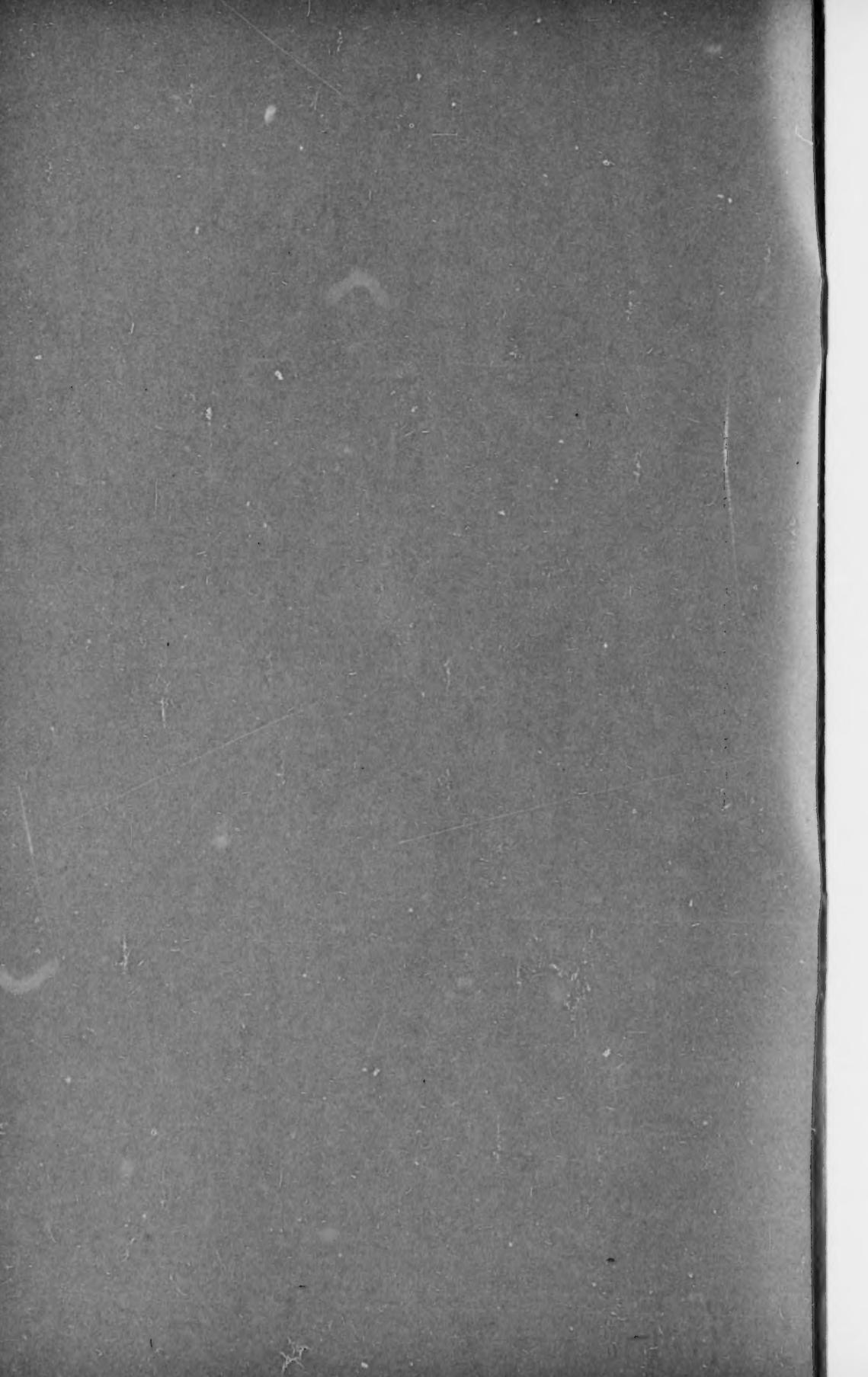
— o —
**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

— o —
THOMAS MARTIN PFLAUM, Esq.
Counsel of Record
SIMON, SCHINDLER, HURST
& SANDBERG
1492 South Miami Avenue
Miami, Florida 33130
Telephone: (305) 358-8611

AND

LUCIA ALLEN DOUGHERTY,
City Attorney
Co-Counsel of Record
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 579-6700

Attorneys for City of Miami



QUESTION PRESENTED

Does the United States Constitution require each local government in the United States to adopt an administrative rule formally authorizing their police officers to abandon hot pursuit of fleeing felons when, in the officers' judgment, the continuation of pursuit would be unduly dangerous?

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No. 86-640

In The
Supreme Court of the United States
October Term, 1986

GENEVA HARRIS, as Personal Representative of
the Estate of Doretha a/k/a Dorothea Rolle, Deceased,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

On Petition For Writ of Certiorari From
The Florida Third District Court of Appeal

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinions of the Florida District Court of Appeal, Third District (hereinafter "Third District"), are reported at 490 So.2d 69 and are contained in the Petitioner's appendix at pp. 1-37.

JURISDICTION

The opinions of the Third District were rendered April 1st and 9th and June 3rd, 1986. Petitioner then filed a second motion for rehearing which was denied without

opinion on July 14, 1986. The jurisdiction of this Court has been invoked by the Petitioner under 28 U.S.C. Section 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 1 of the Fourteenth Amendment to the United States Constitution:

“... No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

Title 42, U.S.C. Section 1983:

“Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

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STATEMENT OF THE CASE

Respondent cannot accept Petitioner's statement of the case and synopsis of the facts and offers the following statement instead.¹

¹ Citations will be presented as follows: Petitioner's Appendix ("Pet. App. —"); Respondent's Appendix ("Res. App. —"); Trial Transcript ("TT —"); Record on Appeal ("R —").

On April 27, 1980, Miami police officers attempted to apprehend a burglar named Rolle. Mr. Rolle fled through the City at high speed in a Cadillac and the police followed in hot pursuit. The police surrounded and momentarily captured Mr. Rolle but he escaped, braving police revolvers pointed at his head, by throwing his vehicle into reverse, jumping the curb, driving across private yards and nearly running over police officers on foot. Pursuit resumed and road blocks were devised but Mr. Rolle evaded capture by again driving across sidewalks and front yards. (R. 1-9; TT. 646-666, 173.) Eventually Mr. Rolle made an abrupt turn immediately in front of his pursuers and was struck by one of the police cars. Fish-tailing around a corner, Mr. Rolle lost control of his vehicle and, approximately a block and a half later, ran up on a sidewalk and over Mrs. Rolle (no relation to Mr. Rolle) who was seated on a bench. Mrs. Rolle was severely injured and later died. (TT. 147-237, 567-608, 623-642, 642-671, 800-820.)

Plaintiff, the victim's representative, filed suit against the City. Plaintiff did not sue Mr. Rolle or any of the police officers involved. Plaintiff's complaint (R. 1-9; Res. App. 1-9) was based on a common-law theory of "negligent failure to capture." Plaintiff alleged that the police had negligently allowed Mr. Rolle to evade capture by not taking more aggressive action *before* he ran over Mrs. Rolle.² Plaintiff also advanced a claim under 42

² Plaintiff alleged that the police had negligently failed to take advantage of many prior opportunities to capture or disable Mr. Rolle, allegedly because the police department had a policy of avoiding damage to its police cars even at the risk of allowing a dangerous felon to escape capture. (Res. App. pp. 1 to 9.)

U.S.C. Sec. 1983. Plaintiff alleged that the City had deprived Mrs. Rolle of her "right to life without due process of law" by failing to train its police officers how to capture fleeing felons and/or by adopting a policy of avoiding damage to its vehicles even when it meant allowing criminals to evade or escape capture.

After Plaintiff presented her case at trial, the trial judge permitted Plaintiff to radically alter her federal claim against the City. (TT. 545, 843-844.) The trial court permitted Plaintiff to amend the complaint *ore tenus* to allege that the City had violated the United States Constitution by failing to have a regulation authorizing its officers to *abandon* pursuit whenever pursuit became unduly dangerous.³ As later explained on appeal to the district court (Rolle's Answer Brief at pp. 36-37), Plaintiff's federal claim was that the City had violated Mrs. Rolle's rights by directing its officers to pursue fleeing felons and not formally authorizing them to use their discretion in *abandoning* pursuit whenever pursuit became unreasonably dangerous. Plaintiff thus accused the City of implicitly causing the police to pursue without regard to the danger they were creating.⁴

³ Plaintiff had originally claimed that the City had violated Mrs. Rolle's constitutional rights by inducing excessive forbearance by its officers; Plaintiff at trial was permitted to turn that claim on its head by alleging that the City had violated Mrs. Rolle's constitutional rights by inducing its officers to be excessively fierce in their effort to stop Mr. Rolle.

⁴ As the Third District later phrased it, Mrs. Rolle's theory was that the City had mandated that its police pursue fleeing criminals until apprehension and "failed to provide for

(Continued on following page)

The trial court submitted both the common law *respondeat superior* claim and the (amended) federal claim to the jury. The jury was asked to decide *only* whether the City had negligently adopted "an inadequate policy in regard to police chases that was a legal cause of the death of Dorothea Rolle." (Res. App., pp. 10-11.) The jury decided that question in the affirmative, and judgment was entered accordingly. (R. 566-567.) The jury did not and was not asked to apportion liability or damages between the common-law negligence and Federal Constitutional claims, but the amount awarded far exceeded the City's maximum tort liability limits under state law.

The City appealed to the Florida Third District Court of Appeal. Mrs. Rolle defended her Federal recovery by asserting that the City, having instructed its police to pursue fleeing felons, should have had (but lacked) a countervailing "proviso" authorizing its police to suspend pursuit when in their judgment pursuit became unreasonably dangerous. Plaintiff argued on appeal that the *absence* of a "discretionary-abandonment" policy was a Constitutional violation.⁵

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the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death. . . ." (Pet. App. 23-24; emphasis supplied.)

⁵ As established at trial (TT. 386-387) in common with most other cities the City of Miami did have express regulations requiring the police to abandon pursuit in specific situations (e.g., whenever the police lost sight of the fleeing criminal and whenever environmental conditions made pursuit too hazardous), and also restricting pursuit in school zones, restricting the speed the police could use, requiring complete stops at all intersections, and requiring the

(Continued on following page)

The Third District initially affirmed the judgment against the City based on both on the common law and Section 1983 claims. The City moved for rehearing solely with respect to the Plaintiff's federal claim, arguing that the Federal Constitution did not require it to adopt a formal rule authorizing "discretionary abandonment" of hot pursuit. While the City's rehearing petition was pending, this Court decided *Pembaur* and *Daniels*.⁶ The Third District granted the City's rehearing petition and retracted its original opinion, observing that the jury had *only* been asked to decide whether the City's hot pursuit policy was "inadequate," and that even if the City's policy *was* "inadequate" that only meant the City was negligent. The Third District noted that there was no evidence in the record showing that the "inadequacy" of the City's policy resulted from anything other than mere oversight by the City. The Court held that such evidence was not sufficient for recovery Under Section 1983. The Third District reaffirmed the common law tort judgment against the City but remanded the case for retrial of Plaintiff's federal claim so that Plaintiff could attempt to prove that the City's failure to adopt a more "adequate" abandonment-of-chase policy constituted a violation of the Plaintiff's federally-secured civil rights. Rather than re-try her federal claim, however, Plaintiff has sought review by the United States Supreme Court.

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use of lights and sirens at all times. Plaintiff's contention was that under the United States Constitution, those safeguards were "inadequate" without the additional safeguard of a formal regulation explicitly authorizing the police to use their own discretion in continuing or abandoning pursuit.

⁶ *Pembaur v. Cincinnati*, — U.S. —, 106 U.S. 1292, 89 L.Ed.2d 452 (1986); *Daniels v. Williams*, 474 U.S. —, 106 S.Ct. 662, 88 L.Ed. 662 (1986).

SUMMARY OF ARGUMENT

1. The Petition does not present a substantial question for consideration because the Petition and the underlying record are both too muddled to warrant review, the challenged opinion is not final, and Petitioner did not seek available review by the Florida Supreme Court.

2. The Petition does not present a substantial question for consideration because even if Mrs. Rolle was killed by a fleeing felon because police officers were too fierce in their pursuit, and even if the police were too fierce because they did not realize they had the discretion to abandon pursuit, and even if the police were ignorant of their right to abandon pursuit because the City failed to adopt a rule so stating, still the City's negligent failure to adopt such a rule of "discretionary abandonment" was not a deliberate policy decision and did not violate Mrs. Rolle's Constitutional rights.

ARGUMENT

I. THE COURT SHOULD NOT ACCEPT THIS CASE BECAUSE THE CHALLENGED OPINION DOES NOT CONSTITUTE A FINAL DECISION; THE QUESTION PRESENTED IS INSUBSTANTIAL; PETITIONER FAILED TO SEEK AVAILABLE REVIEW IN THE FLORIDA SUPREME COURT, AND THE PETITION VIOLATES THE SUPREME COURT RULES.

A. The Record And The Petition Are Too Confused To Warrant Review.

This Court's Rules emphatically require that petitions be lucid and to the point. Supreme Court Rules 21.1 and

21.5 provide that a sufficient basis for denying a petition is a petitioner's failure to state with brevity and clearness the essential points and issues presented for consideration by the Court. *This* petition is so prolix and muddled as to be almost unintelligible.⁷

Neither Respondent nor the Court should be forced to surmise the precise points and issues the Court is being asked to consider. The trial and appellate proceedings below were anything but a model of civil litigation. Both at trial and on appeal *critical* factual and theoretical issues were either overlooked altogether or addressed in cursory fashion. Section 1983 jurisprudence is already sufficiently perplexing to the Bar and the lower courts without this Court accepting for review a case founded on a muddled record and petition.

B. The Case Is Not Final.

The challenged opinion of the Third District does not conclude the controversy but was merely an intermediate step in the litigation. The challenged opinion affirmed the tort judgment against the City and remanded for further evidence on (i) damages, (ii) attorneys' fees, and (iii) Plaintiff's Section 1983 claim. Plaintiff has been given another opportunity to show that the City violated the

⁷ The Petition is also unreliable. The Petition at pages 12-13 asserts that the police chase was without supervision or coordination; that every police unit in half of the City was involved, and that the police were playing "dodgem." The Petition also asserts that a police car "rammed" and locked fenders with Mr. Rolle's vehicle and "forced him" to run over Mrs. Rolle. The Record citations do not, however, support those assertions. For example, the term "dodgem" was used by Petitioner's attorney, not the police, and the testimony concerning the precise cause and effect of the collision was disputed and not resolved by the jury's verdict.

United States Constitution by having an inadequate policy governing police chases. As the case now stands, therefore, Plaintiff prevailed on her non-federal claim (though the question of damages on that claim has yet to be finally determined), and the Plaintiff's federal claim has been remanded for re-adjudication.

In *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 651 (1980), a plaintiff's judgment for damages, based in part on a claim of an unjustified taking under the United States Constitution, was reversed by the state appellate courts, which remanded for a retrial, and this Court dismissed an appeal because in light of the retrial the state court's opinion did not result in a final judgment or decree.

None of the "finality" exceptions recognized by the Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), apply in this case. Petitioner is in effect urging this Court to intervene so that she is not required to try her federal claim, and given the Court's scarce resources the Court should not accept jurisdiction over a case merely to relieve a party of having to submit evidence in support of a federal claim. See e.g., *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

In *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981), the Court dismissed a certiorari petition which arose under similar circumstances. The petitioner in *Minnick* had challenged the constitutionality of a state program and obtained a favorable judgment in the trial court; the California Court of Appeals reversed (also due to an intervening Supreme Court decision) and

remanded for retrial because the evidence in the Record was insufficient to support a finding of unconstitutional behavior under the then-existing caselaw. This Court dismissed the Petition on the grounds that the retrial would have a significant effect on the federal constitutional issues, and that none of the exceptions to finality requirement under *Cox* were present. See also *Odell v. Espinoza*, 456 U.S. 430 (1982), a wrongful-death action arising from police misconduct, in which the Colorado Supreme Court remanded a case for trial and this Court held that the decision was consequently not final "as an effective determination of the litigation" pursuant to *Market Street R.Co. v. Railroad Commissioner of California*, 324 U.S. 548 (1945).

Similarly, in *Flynt v. Ohio*, 451 U.S. 619 (1981), the Court dismissed a petition for writ of certiorari for lack of jurisdiction where a state appellate court had remanded a case for retrial of a federal claim. The Court, quoting from *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), commented that the final-judgment rule precludes reviewability "... where anything further remains to be determined by a state court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the state." In the present case, the matter which remains to be determined on retrial is hardly "disassociated" from the federal issue; the matter to be decided on retrial is *the federal issue itself*.

In addition, even if the Third District's opinion had finally resolved the controversy (which it did not), its opinion would only be of precedential significance in two South Florida counties. The challenged opinion would not

even have precedential weight in the United States District Court for the Southern District of Florida. Respondent submits that such an opinion is not sufficiently important to warrant Supreme Court review.

C. Petitioner Could Have And Should Have Sought Review By The Florida Supreme Court.

In addition, Respondent submits that jurisdiction is lacking because Petitioner could have but did not seek review of the Third District's opinion in the Florida Supreme Court. Under 28 U.S.C. Section 1257, unless the Florida Supreme Court plainly did *not* have jurisdiction to review the Third District's decision, this Court would lack jurisdiction to do so. *Banks v. California*, 395 U.S. 708 (1969). Under the Florida Constitution, however, the Florida Supreme Court has jurisdiction to review any district court opinion in direct and express conflict with any other district court opinion (or Florida Supreme Court opinion) on the same question of law, and also to review any district court decision which expressly construes a provision of the United States Constitution. See Article 5, Section 3(b), Fla. Const. (1968 Rev.). Petitioner did not seek review by the Florida Supreme Court on either ground. Petitioner claims that "conflict" jurisdiction was lacking, but does not even mention the Florida Supreme Court's jurisdiction under Section 3(b)(3).

Numerous recent Florida district Court opinions have expressly and directly construed Section 1983 and would have provided a plausible basis for Florida Supreme Court

"conflict" jurisdiction,⁸ and the Third District's opinions did expressly construe the Due Process Clause of the Fourteenth Amendment. *See generally Ford Motors Co. v. Zikus*, 401 So.2d 1341 (Fla. 1981); *David v. State*, 369 So.2d 943 (Fla. 1979); *State v. Perez*, 372 So.2d 426 (Fla. 1979); *Potvin v. Keller*, 313 So.2d 703 (Fla. 1975); *City of Orlando v. Cameron*, 264 So.2d 421 (Fla. 1972); *Garcia v. Cedars of Lebanon Hospital*, 444 So.2d 538 (Fla. 3d DCA 1984).

Accordingly, this Court should not accept jurisdiction over this case because the Record is inadequate, the Petition muddled, the challenged opinions non-final, and because Petitioner could have but did not seek Florida Supreme Court review.

II. THE UNITED STATES CONSTITUTION DOES NOT PROTECT CITIZENS FROM BEING ACCIDENTLY RUN OVER BY GOVERNMENT EMPLOYEES WHO ARE DRIVING CARELESSLY, NOR DOES THE FEDERAL CONSTITUTION REQUIRE CITIES TO ADOPT FORMAL RULES GIVING THEIR POLICE DISCRETION TO ABANDON HOT PURSUIT.

Dorothea Rolle was run over by a car driven by a criminal who, while fleeing capture, collided with a pur-

⁸ See, e.g., *Lloyd v. Hines*, 474 So.2d 376 (Fla. 1st DCA 1985) (discussing the liability under Section 1983 of a sheriff for negligence with respect to the supervision of employees); *Higdon v. Metropolitan Dade County*, 446 So.2d 203 (Fla. 3d DCA 1984) (alleging county liability based on inadequate police protection); *Penthouse, Inc. v. Saba*, 399 So.2d 456 (Fla. 2d DCA 1981) (concerning the liability of government officials for failure to observe local laws or ordinances); *Rankin v. Coleman*, 476 So.2d 234 (Fla. 5th DCA 1985) (expressly discussing the liability of a sheriff based on a policy alleged to violate the Constitution).

suing police car and lost control of his vehicle. Plaintiff below never proved anything more than negligence by the police, and with respect to the City, Plaintiff only alleged that the City should have had but lacked a formal policy giving the police discretion to abandon pursuit. Accordingly, this case is merely a wrongful death case arising from careless driving by a City employee and negligent supervision by the City.⁹

Once Petitioner's hyperbole is strained away, the *very most* that the record reflects is that a City employee, in the course and scope of his employment, operated his motor vehicle carelessly and "caused" (or contributed to) the death of a bystander, and that the "cause" of the employee's negligence was his employer's failure to adopt a rule promoting careful driving. Petitioner thus advocates the following as a proper constitutional syllogism to govern this case:

1. Mrs. Rolle was killed by a fleeing criminal because a government employee was too aggressively trying to capture him.
2. The employee was too aggressive because the City did not tell him he did not have to be too aggressive.

⁹ Petitioner now characterizes the police conduct as "reckless," but the jury never rendered any such verdict and was not asked to do so, and the Third District's rehearing opinion characterized the police as negligent, not reckless. Moreover, since the police were not defendants, *their* mental state is irrelevant. The City was the Defendant and all Plaintiff proved with respect to the City was that its policy was "inadequate." In *Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444 (5th Cir. 1985) the Court affirmed the dismissal of a Section 1983 complaint alleging negligence and commented that "Section 1983 liability depends on more than a failure to exercise the requisite duty of care."

3. The United States Constitution required the City to tell its employees they did not have to be too aggressive.

4. Ergo Mrs. Rolle was deprived by the City of her federal constitutional rights.

In point of fact, Petitioner's proof at trial proved both too much and too little. For purposes of holding the City employer liable under traditional *respondeat superior* doctrine Plaintiff proved too much because the City was liable for the officer's negligence *without* additional proof that the City was independently negligent for not supervising its employees. For purposes of holding the City liable under Section 1983, however, the evidence proved too little because proof of negligent supervision by the City was insufficient for purposes of holding the City liable under the Civil Rights Act. As this Court recently affirmed in *Daniels, supra*:

"Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Daniels*, 106 S.Ct. at 665.

As the Court commented, the Constitution is intended to deal with the larger concerns of government and does not "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.*

Petitioner asks this Court to rule that the City's failure to have an "adequate" policy governing hot pursuit was a *Constitutional* sin of omission. However, to convert this wrongful death case into a Constitutional

tort would mean that virtually every tort by a government employee would give rise to a constitutional claim against the government. A tort claim based on careless driving by a City employee—whether policeman or bus driver hardly matters in the context of this case—is as far removed from the concerns of the United States Constitution as any tort claim could be. In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978), the Court explained that municipal liability under Section 1983 is limited to deprivations of federally protected rights. In this case, Petitioner has *never* defined a federally-protected right imperiled by the City of Miami's "inadequate" policies governing hot pursuit. See *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Paul v. Davis*, 424 U.S. 693, 698 (1976), this Court *specifically warned* against the very sort of expansion here advocated by Petitioner, proposing a "far-fetched"—but as it turns out, clairvoyant—hypothetical to make its point:

"It would be difficult to see why the survivors of the innocent bystander . . . negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under Section 1983."

See also *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), likewise warning against such an expansion of Section 1983 because if such an expansion were allowed then "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983." See also *Baker v. McCollan*, 443 U.S. 137 (1979); *Owen v. City of Independence*, 445 U.S. 622 (1980); and *Polk County v. Dodson*, 102 S.Ct. 445 (1981).

The City's failure to adopt a formal rule explicitly confirming the discretionary authority of its police offi-

cers to abandon pursuit was, *at most*, a violation of a duty of care arising out of state tort principles, not a violation of the United States Constitution. The Due Process Clause does not extend to individuals a right to be free of injury whenever a government is characterized as a tortfeasor, for the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Davidson v. Cannon*, — U.S. —, 106 S.Ct. 668, 670-71 (1986); *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Johnson v. Barker*, 799 F.2d 1396 (9th Cir. 1986).

Daniels and *Pembaur* were cited by the Third District as justification for retracting its original opinion, but actually the Section 1983 judgment against the City was incorrect for reasons predating those decisions. Under well-established federal precedent, it was not unconstitutional for the City to direct its police officers to apprehend fleeing felons—that after all is the *purpose* of having police—nor is the United States Constitution concerned with the City's negligent failure to formally remind its police that they are allowed to chase criminals "carefully". If as a result of the City's failure to direct its police to chase criminals carefully the police officers chased criminals carelessly and so "caused" the Petitioner's injury, then the City is liable as a matter of tort law but not federal constitutional law.¹⁰

¹⁰ No Federal Court has ever held that such a supervisory omission violates the United States Constitution. On the contrary, in *Richardson v. City of Indianapolis*, 658 F.2d 494 (7th Cir. 1981), a party was killed after a high-speed automobile chase and the Seventh Circuit held that the city could not be held liable based on a police failure to

Petitioner has written a lengthy brief the primary purpose of which, it seems, is to show that the Third District did not understand this Court's decisions in *Daniels* and *Pembaur*, but Petitioner's Section 1983 recovery was unjustified even in the absence of *Pembaur* and *Daniels*. In *Baker v. McCollan*, 443 U.S. 137 (1979), this Court noted that although a government may be liable under tort principles,

"Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because a defendant is a state official."

Baker at 146.

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abandon the chase. The Circuit Court agreed with the district court's conclusion that pursuit of a criminal fleeing at high speed was proper and was indeed the legal obligation of the city and its police officers:

"It was the duty of the defendant governmental units and agencies to instruct their employee defendant officers to pursue the decedent when he resorted to high-speed evasive flight to avoid arrest. . . ."

Id. at 499.

Therefore, even before *Pembaur* and *Daniels* were decided the City could not have been held liable under Section 1983 because liability can only arise for a violation of an established constitutional duty. *Davis v. Scherer*, 468 U.S. 183, 194 (1984). The City should never have been penalized for failing to predict what would have been an *unprecedented aberration* in the federal case law. *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986).

Just as medical malpractice and false imprisonment are not constitutional violations, so a wrongful death attributable to a government's supervisory negligence does not give rise to a Section 1983 claim, and that was true long before *Daniels* and *Pembaur* were decided. Petitioner can hardly complain that the Third District cited *Pembaur* and *Daniels* as the official reason for rescinding its initial opinion, since that rationale also justified the remand which gave Petitioner a right to retry her case. Had it not been for the Third District's reliance on *Pembaur* and *Daniels* (however unnecessary), the proper outcome would have been a remand for entry of final judgment in the City's favor.

Federal decisions arising from conceptually similar factual patterns, decided before *Pembaur* or *Daniels*, confirm that the Third District was right to reverse the Section 1983 judgment against the City, and that a reversal was proper even without the added authority of *Daniels* and *Pembaur*. For example, in *Major v. Benton*, 647 F.2d 110 (10th Cir. 1981), an individual died in a cave-in on a government supervised sewer project and his survivors alleged that the government was liable for *failure to formulate safety measures*, a claim conceptually indistinguishable from Petitioner's claim here. The Tenth Circuit affirmed summary judgment in favor of the government on the grounds that "a death resulting from the negligent action of a state official does not in itself raise a constitutional claim." *Id.* at 113. The Court, citing *Screws v. United States*, 325 U.S. 91 (1945), held that the Fourteenth Amendment does not extend to citizens the right "to be free from the torts of state officials. Instead, specific

constitutional guarantees must be implicated to give rise to due process protection." *Id.* at 113. *See also Martinez v. California*, 444 U.S. 277 (1980); *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981).

In *Oklahoma City v. Tuttle*, — U.S. —, 105 U.S. 2427, 85 L.Ed.2d 791 (1985), a police officer intentionally shot and killed the plaintiff's decedent when he refused to obey a police order to "freeze."¹¹ The Plaintiff in *Tuttle* sued the city on the theory that a city custom or policy caused the shooting, based on its failure to properly supervise its police officers. Petitioner's theory *sub judice*—that the City should have had but lacked a rule authorizing the abandonment of pursuit, is of course merely a specific variety of supervisory failure as generally alleged in *Tuttle*. As here, the plaintiff in *Tuttle* did not claim or prove that the City had a deliberate policy of authorizing misconduct by its officers. This Court noted, however, that the word "policy" implies a course of action consciously chosen from among various alternatives. In the present case there was absolutely no evidence presented that the City of Miami ever gave any consideration to the lack of or need for the additional policy which Plaintiff contended the City should have had, any more than there was proof in *Tuttle* that the policy-makers in Oklahoma City had deliberately chosen an inadequate training program.

¹¹ As in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1986), the death in *Tuttle* was intended by the police, while the death of Mrs. Rolle was the completely unintended and unforeseen result of an accidental collision with a fleeing felon.

In *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), a high-speed chase by police resulted in a crash and severe injuries to a 13 year old driver. A Section 1983 action was brought against the government, and the Sixth Circuit affirmed summary judgment for the government defendant, holding that high-speed pursuit did not violate the Fourth or Fourteenth Amendments. The Court held that high-speed pursuit by police officers is not an unreasonable method of law enforcement and does not infringe the United States Constitution. Similarly, in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), a police vehicle struck and killed the plaintiff and the Court held that there is no Section 1983 cause of action for injuries received in an automobile accident involving the negligence of city police:

"The death occurred in an automobile accident, allegedly caused by the negligence of a police officer driving a city vehicle in the course of duties. No cases have been cited to this Court which held that automobile negligence by a state officer deprives an injured victim of due process of law."

Id. at 949.¹² The Eleventh Circuit in *Cannon* held that a person injured in an automobile accident caused by the negligent (or even grossly negligent) operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal

¹² Without suggesting that the collision in this case constituted the application of "deadly force," certainly not as to Mrs. Rolle, see *Tennessee v. Garner*, — U.S. —, 105 S.Ct. 1694, 1701 (1985): "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

right. *Id.* at 950. The Court in *Cannon* also held that even if government officials had failed to control their police officers, such a failure did "not equate to an indifference to constitutional rights." *See also Reeves v. City of Jackson*, 608 F.2d 644, 652 (5th Cir. 1979); *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976) (pedestrian struck and killed by police car responding to call of armed robbery in progress; actions of officer who wantonly disregarded the safety of others do not give rise to a claim under Section 1983); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir. 1982); *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986) ("[N]egligent conduct by the state official is not enough to state a claim under Section 1983 based on alleged violations of the Fourteenth Amendment due process clause." *Id.* at 1413.)

In *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), a city and its police officers were sued because the police officers failed to assist a young couple trapped in a burning vehicle after an accident. The Court assumed that the complaint stated a proper claim under general tort principles, but held that it did not state a claim under Section 1983. The Court held that the plaintiff's claim could not succeed without evidence that the defendants had killed the plaintiff's decedent "in circumstances making the killing an intentional tort." As the Seventh Circuit commented: "Section 1983 is not a mandate of highway safety." *Id.* at 1205. *See also Rizzo v. Goode*, 423 U.S. 362 (1976) (for the proposition that a "general allegation of administrative negligence fails to state a constitutional

claim cognizable under Section 1983"); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) (confirming that Section 1983 liability of a government cannot be based on simple negligence by the policy-makers, but must at least be based on "gross indifference amounting to conscious indifference."); *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982); *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986) (where the plaintiff's decedent sued a city and its police officers for failing to intervene sooner during a barroom brawl which led to the death of an innocent bystander, and the Ninth Circuit held that the Plaintiff could not show a deprivation of rights secured by the Constitution or other federal law).

As the Fifth Circuit remarked in *Williams v. Kelly*, 624 F.2d 695, 697 (5th Cir. 1980), for a Section 1983 claim to arise the government must commit "the sort of abuse of governmental power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." A failure by government to police the community or its own employees may well be tortious, but it is not a *constitutional* tort which justifies prosecution under Section 1983 action. *Hull, supra* at 585.

This Court's decisions in *Pembaur* and *Daniels* were not revolutionary; they merely confirmed principles already expressed by this Court on many prior occasions. Accordingly, the Third District was right to have reversed the Section 1983 judgment against the City, because all Plaintiff proved at trial was that the City lacked an adequate "chase" policy. That reversal was mandated by this Court's decisions in *Daniels* and *Pembaur*, and it was mandated by Supreme Court and Circuit Court decisions

predating *Daniels* and *Pembaur*. The City's failure to have adequate rules governing hot pursuit may have been tortious but it was not unconstitutional.



CONCLUSION

The petition for a writ of certiorari should be denied because the case is insubstantial and the Florida District Court correctly applied the legal principles established by this Court in rendering its decision. Jurisdiction is accordingly lacking.

Respectfully submitted,

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APPENDIX

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App. 1

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO. 82-7845

MRS. GENEVA HARRIS, as)	
Personal Representative of)	
the Estate of DORETHA ROLLE,)	
Deceased,)	
)	
Plaintiff,)	COMPLAINT AT
vs.)	LAW AND
)	DEMAND FOR
)	JURY TRIAL
THE CITY OF MIAMI, a municipal)	
corporation; the CITY OF MIAMI)	
POLICE DEPARTMENT, a city)	
agency, and RONALD L.)	
KUTCHER,)	
Defendants.)	

COMES NOW the Plaintiff, MRS. GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, for the benefit of said Estate and the decedent's three minor children and sue and complain of the Defendants, the CITY OF MIAMI, a municipal corporation and the CITY OF MIAMI POLICE DEPARTMENT, a city agency, as follows:

1. This is an action for damages in excess of \$10,000.00, exclusive of interest and costs, under the Florida Wrongful Death Statute, F.S. § 768.16, et seq.

2. This is also an action in accordance with Florida Statute § 768.28. The Plaintiff has complied with any and all requirements of said statute as to notice, etc.

3. Concomitantly and/or alternatively this action is brought pursuant to 42 U.S.C. Section 1983 and the Four-

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teenth Amendment of the United States Constitution. Jurisdiction is founded upon 28 U.S.C., Section 1331 and Section 1343 and the aforementioned statutory and constitutional provisions.

4. The Plaintiff was and is a citizen of the United States, a resident of Dade County and the State of Florida; and the duly appointed Personal Representative of the Estate of her daughter, DORETHA ROLLE, Deceased.

5. At the time of her death on April 27, 1980 DORETHA ROLLE was sui juris, a citizen of the United States, and the State of Florida, and a resident of Dade County, Florida. At said time MRS. ROLLE was the natural mother of three children under the age of 18 years, i.e., AARON C. ROLLE, DERRICK S. ROLLE, and GLENDORA D. ROLLE.

6. The Defendant, CITY OF MIAMI, at all times material hereto, was and is a municipal corporation within the State of Florida; the operator and director of an agency, known as "the CITY OF MIAMI POLICE DEPARTMENT," and the employer of any and all police officers to be later described in this Complaint.

6A. At all times material hereto, RONALD L. KUTCHER, was the owner of the motor vehicle being operated by TYRONE ROLLE, with the consent and permission of RONALD L. KUTCHER.

7. All of the police officers, to be later described in this Complaint, were, at all times material hereto, acting in the course and scope of their employment with the CITY OF MIAMI and the CITY OF MIAMI POLICE DEPARTMENT; and under color of law, to-wit: under the color of the statutes, ordinances, regulations, customs and usages

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of the United States, and of the State of Florida, pursuant to their respective authority as police officers of the CITY OF MIAMI.

8. On or about April 27, 1980 at approximately 8:30 P.M., a police officer of Defendant, CITY, heard glass breaking at the Biscayne Shopping Center in the CITY OF MIAMI. A few minutes later, the officer in a patrol car then observed a white Cadillac, owned by RONALD L. KUTCHER and operated by TYRONE ROLLE, leaving the aforescribed shopping center slowly with its lights out. It was the belief of said officer that TYRONE ROLLE had stolen several boxes of clothing from a J. C. Penny store.

9. Said officer then attempted to pull over the white Cadillac but failed.

10. A chase then ensued involving the white Cadillac and at least a dozen police cars and numerous police personnel from the CITY OF MIAMI and POLICE DEPARTMENT of said City.

11. At all times material hereto, the police aspects of said chase and attempted apprehension of TYRONE ROLLE, was completely under the direction and control of supervisory personnel of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT.

12. During the initial portion of the chase (as well as the entire portion of the chase) the white Cadillac (with the police vehicles in question in immediate pursuit) proceeded erratically up and down the streets, sidewalks, and highways of the CITY OF MIAMI at an extremely high rate of speed—through numerous red lights, stop signs, etc.;

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making U-turns in front of police cars, running over the sidewalks, etc.

13. At all times material throughout the entire chase, it was known, understood and believed by the police officers involved in the chase, that if the chase continued in the manner to be described in this complaint, an innocent bystander was going to be hurt by the white Cadillac. Yet, despite the aforescribed, the decision was made by the supervisory personnel and the police officers of the CITY OF MIAMI to continue the chase in the manner in which they did.

14. Approximately five (5) minutes after the chase commenced said police officers blocked the white Cadillac's route. When the white Cadillac's driver appeared to no want to stop for the blockade, the police officers removed the blockade for fear of incurring physical damage to their police vehicles.

15. Approximately 10 minutes after the chase commenced, the white Cadillac was forced to stop at the intersection of N.W. 75th Street and N.W. 17th Avenue due to traffic in front of said vehicle. The CITY OF MIAMI POLICE, then and there, completely surrounded said vehicle. Three of the officers then went up to the white Cadillac and with their heads inside or almost inside the white Cadillac's open window, told the driver to surrender. The driver, with the police officers screaming in his ear, put the car in reverse aiming for another police car. Said police car then and there moved out of the way, (again for fear of damage to the police vehicle) allowing the white Cadillac to escape.

16. At no point, up until the driver put the white Cadillac in reverse, as described in paragraph 15, did the po-

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lice attempt to disable the white Cadillac; or use force to restrain the driver of said vehicle; all of which was below the minimum standard of police procedure.

17. This "non-action" by the police as specified in paragraph 16 was done (a) despite the fact that the police knew an innocent bystander was going to be hurt; and (b) despite the fact that numerous opportunities were presented to the police to disable the white Cadillac and/or restrain its driver. It was done in large measure out of fear by the police and supervisory personnel of sustaining property damage to the police vehicles.

18. Subsequent to the escape of the white Cadillac as described in paragraph 15, the chase continued in the manner specified in paragraph 12 for at least another 15 minutes.

19. At approximately the intersection of N.W. 58th Street and N.W. 7th Avenue, the white Cadillac again went up on a sidewalk; this time striking a bus bench and DOR-ETHEA ROLLE, who was seated on said bench. MRS. ROLLE was pinned under the white Cadillac. MRS. ROLLE was then dragged several blocks suffering severe burns and internal injuries. She died a few hours thereafter as a result of the burns and injuries.

I. CLAIM AGAINST THE CITY OF MIAMI AND THE CITY OF MIAMI POLICE DEPARTMENT FOR NEGLIGENCE IN ACCORDANCE WITH FLORIDA STATUTES § 76.28 et seq./ Respondeat Superior

The Plaintiff realleges and readopts paragraphs 1-19 of this Complaint and further states:

20. The police officers in question, as previously mentioned, were acting, at all times, in the course and scope

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of their employment with the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT.

21. The police officers in question had a duty to the public, and to the Plaintiff's decedent in particular, to exercise a reasonable degree of care for her safety under the circumstances as alleged in this Complaint.

22. The police officers in question breached said duty to the Plaintiff's decedent under the circumstances and were negligent in that they improperly, unreasonably, knowingly, and foreseeably exposed Plaintiff's decedent to the improper risk of harm under the circumstances by, among other things:

a) Negligently and carelessly, under the circumstances, conducting a chase specified in paragraphs 8-19 of this Complaint.

b) Negligently and carelessly, under the circumstances, conducting the chase in the manner as specified in paragraphs 8-19 of this Complaint.

c) Negligently and carelessly, under the circumstances, failing to disable or apprehend TYRONE ROLLE prior to his striking Plaintiff's decedent, or attempt same, all of which is specified in paragraphs 8-19 of this Complaint.

d) Negligently and carelessly, under the circumstances, failing to disable the vehicle driven by TYRONE ROLLE, or attempt same, prior to said vehicle striking the Plaintiff's decedent; all of which is specified in paragraphs 8-19 of this Complaint.

II. CLAIM AGAINST THE CITY OF MIAMI AND THE CITY OF MIAMI POLICE DEPARTMENT FOR DIRECT NEGLIGENCE IN ACCORDANCE WITH FLORIDA STATUTE § 76.28 et seq AND RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS IN ACCORDANCE WITH 42 U.S.C. SECTION 1938

The Plaintiff adopts and realleges paragraphs 1-19 of this Complaint and further states:

23. At all times material hereto the chase as described specifically in paragraphs 8-19 and 20-22 of this Complaint was directed, controlled, and supervised by managing agents, and managing officers of the Defendants.

24. At all times material hereto said managing agents and officers had a duty to Plaintiff's decedent to exercise a reasonable degree of care for her safety under the circumstances as alleged in this Complaint.

25. At all times material hereto said managing agents KNEW that if the chase continued, in the manner that it did, that an innocent bystander was going to get hurt.

25A. Yet, the CITY OF MIAMI and the CITY OF MIAMI POLICE DEPARTMENT had instituted a policy, which had been communicated to its police officers, to avoid property damage to its vehicles at almost all cost.

26. Said managing agents and managing officers knowingly and recklessly breached said duty to Plaintiff's decedent, under the circumstances, and were grossly negligent in that they knowingly exposed Plaintiff's decedent to an improper risk of harm under the circumstances by, among other things:

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a) Conducting the chase, under the circumstances, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

b) Conducting the chase in the manner, under the circumstances, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

c) Failing to have attempted to disable or apprehend TYRONE ROLLE under the circumstances prior to his striking Plaintiff's decedent, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

d) Failing to have attempted to disable TYRONE ROLLE's vehicle under the circumstances prior to said vehicle striking Plaintiff's decedent, as specified in paragraphs 8-19 of this Complaint, despite the known risk of harm to Plaintiff's decedent.

e) Failing to have adequately trained its police officers so that they might properly respond to the situation which presented itself to said police officers under the circumstances as specified in paragraphs 8-19; and more importantly, knowingly conducting the chase in the manner in which they did, with inadequately trained police officers, under the circumstances.

f) Placing the police officers directly involved in the chase, in a situation, where they were more concerned with city property damage, than the human life of a citizen of the City.

27. As a direct and proximate result of the negligent and reckless acts and omissions of the managing

agents and managing supervisors of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT as afore-described: a) Plaintiff's decedent was deprived of a right secured by the Constitution of the United States and: b) said deprivation was caused by persons acting under color of State law—i.e., the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT violated, under the circumstances specified, Plaintiff's decedent's right to life without due process of law, as explicitly guaranteed by the Fourteenth Amendment.

III. CLAIM AGAINST RONALD L. KUTCHER

The Plaintiff realleges and adopts paragraphs 1-19 of this Complaint and further states:

28. Defendant, RONALD L. KUTCHER, as the owner of the white Cadillac in question is responsible to the Plaintiff for the negligent acts and negligent use of his vehicle as specified in this Complaint by his permissive driver, TYRONE ROLLE.

IV. COMPENSATORY DAMAGES

The Plaintiff readopts and realleges paragraphs 1-28 of this Complaint and further states:

29. As a direct and proximate result of the wrongful death of DORETHA ROLLE; and the actions and non-actions of the CITY OF MIAMI; CITY OF MIAMI POLICE DEPARTMENT, and RONALD L. KUTCHER in directly causing same; the following damages have been sustained:

A) AARON ROLLE AS A SURVIVOR AND
MINOR CHILD OF HIS MOTHER,
DORETHA ROLLE

- 1) The value of lost support and services; past, present and future;
- 2) The value of lost parental companionship, instruction and guidance; past, present and future;
- 3) Mental pain and suffering; past, present and future.

B) DERRICK S. ROLLE AS A SURVIVOR AND
MINOR CHILD OF HIS MOTHER, DORETHA
ROLLE

- 1) The value of lost support and services; past, present and future;
- 2) The value of lost parental companionship, instruction and guidance; past, present and future.
- 3) Mental pain and suffering; past, present and future.

C) GLENDORA D. ROLLE AS A SURVIVOR AND
MINOR CHILD OF HER MOTHER, DORETHA
ROLLE

- 1) The value of lost support and services; past, present and future;
- 2) The value of lost parental companionship, instruction and guidance; past, present and future;
- 3) Mental pain and suffering; past, present and future.

D) THE ESTATE OF DORETHA ROLLE, DECEASED

1) Medical and funeral expenses due to the decedent's death which have become a charge against the Estate or that were paid for or on behalf of the decedent.

2) Statutory attorney fees in accordance with 28 U.S.C. 1983.

IV. PUNITIVE DAMAGES AGAINST CITY OF MIAMI AND CITY OF MIAMI POLICE DEPARTMENT IN ACCORDANCE WITH 28 U.S.C. 1983 FOR RECKLESS CONDUCT AND GROSS NEGLIGENCE

The Plaintiff readopts and realleges paragraphs 1-27 of this Complaint and further states:

30. The reckless conduct and gross negligence of the CITY OF MIAMI and CITY OF MIAMI POLICE DEPARTMENT in accordance with 28 U.S.C. 1983 as specified in paragraph 8-27 of this Complaint are deserving of punitive damages on behalf of the Estate.

WHEREFORE, the Plaintiff sues the Defendants, jointly and severally, and request a jury trial on all issues triable of right by jury.

DATED: April 26, 1982.

FELDMAN, ABRAMSON, SMITH,
MAGIDSON & LEVY, P.A.

Attorneys for Plaintiff
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Miami, Florida 33131
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/s/ David L. Magidson

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 82-7845 (CA-30)

GENEVA HARRIS,)	
as Personal Repre-)	FINAL JUDGMENT IN FAVOR
sentative of the Es-)	OF GENEVA HARRIS, AS PER-
tate of DORETHA)	SONAL REPRESENTATIVE
ROLLE, Deceased,)	OF THE ESTATE OF DORE-
	THA ROLLE, DECEASED, ON
Plaintiffs,)	BEHALF OF SURVIVORS,
VS.)	DERRECK S. ROLLE, AARON
	ROLLE, GLENDORA D. ROLLE
CITY OF MIAMI, a)	AND GENEVA HARRIS AND
municipal corpora-)	AGAINST THE CITY OF MI-
tion,)	AMI, A MUNICIPAL CORPO-
Defendant.)	RATION.
_____)	

(June 13, —)

This is a FINAL JUDGMENT in favor of GENEVA HARRIS, as Personal Representative of the Estate of DORETHA ROLLE, Deceased, on behalf of the survivors, DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS and against the CITY OF MIAMI, a municipal corporation.

This cause was tried by and through a Jury Trial between May 29, 1984 and June 1, 1984. On June 1, 1984, this matter was submitted to a Jury and resulted in a verdict in favor of the Plaintiffs and against the Defendant, as follows:

WE, THE JURY, return the following verdict.

1. Did the City of Miami have an inadequate policy in regard to police chases that was a legal cause of the death of DORETHA ROLLE?

YES.....X..... NO.....

2. Was there negligence on the part of the City of Miami which was a legal cause of the death of DORETHA ROLLE?

YES.....X..... NO.....

If your answers to both of the above questions are "NO", then your verdict is for the Defendant and you should not proceed further except to date and sign this verdict form and return it to the Courtroom.

If your answer to either of the above questions is "YES", please answer question "3".

3. What is the total amount (100%) of any damages sustained by DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS caused by the death of DORETHA ROLLE.

Total damages of:

DERRECK S. ROLLE	\$165,000.
AARON ROLLE	\$165,000.
GLENDORA D. ROLLE	\$165,000.
GENEVA HARRIS	\$100,000.

SO SAY WE ALL THIS 1 day of JUNE, 1984.

/s/ _____
FOREPERSON

Accordingly, in accordance with the foregoing, it is therefore:

1. ORDERED AND ADJUDGED that FINAL JUDGMENT be and it is hereby entered in this cause in

favor of the Plaintiffs and against the Defendant CITY OF MIAMI, in the sums of \$165,000. for DERRECK S. ROLLE; \$165,000. for AARON ROLLE; \$165,000. for GLENDORA D. ROLLE; and \$100,000 for GENEVA HARRIS, survivors, all lawful money of the United States of America, plus legal interest thereon from the date of this Judgment.

2. IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this cause for any and all post trial motions; for the determination of statutory attorney's fees; and for the determination of the taxation of costs by the Plaintiffs against the Defendant as per this Order.

DONE AND ORDERED at Miami, Dade County, Florida this 12 day of June, 1984.

MURRAY GOLDMAN
CIRCUIT COURT JUDGE

Conformed copies furnished to:

Donald Feldman, Esq.
Feldman & Levy, P.A.

David L. Magidson, Esq.
Abramson & Magidson, P.A.

Gisela Cardonne, Esq.
